Supreme Court, U.S.
FILED
MAR 2002

Nº. 011428

In The
Supreme Court of the United States

THE TAYLOR GROUP, AN INDIANA GENERAL PARTNERSHIP, ET AL.,
Petitioner,
v.
ANR STORAGE COMPANY, A MICHIGAN CORPORATION,
Respondent.

Petition For a Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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March, 2002

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QUESTIONS PRESENTED

Does a federal court make an error of law in holding that collateral estoppel bars Plaintiffs' claim when the applicable and controlling state law holds that a prior judgment on the merits is an element of collateral estoppel and the federal court previously determined that the prior state judgment was not a judgment on the merits?

Does a federal court make an error of law and abuse its discretion in denying plaintiffs' motion to amend complaint on the basis that such an amendment would subject the defendant to duplicative discovery?

PARTIES TO THE PROCEEDINGS

Petitioners:

The Taylor Group, An Indiana General Partnership; Charles R. Newman;
Stephen R. Newman;
Marilyn Dodds;
Christine Newman Aumiller;
Irma Newman;
Keith Dempsey;
Carolyn M. Dempsey;
Roland J.W. Linder; Estate Of Ruth Dempsey, Dec'd;
Narlyn D. (Dempsey) Vinyard;
Basil Dempsey;
Bryna M. Dye;
Winifred Y. Blossom;
Ray Bullock;
Kris A. Bullock;
Jeanne L. Bullock;
Jack L. White;
William J. White;
Carol Jane Harshman;
Dee Ann Peterson;
Ken A. Stoops;
Sheryl L. White;
Christine M. (Neideck) Weiss;
Steven P. Neideck;
Robert R. Neideck, Jr.;
Margaret C. Neideck;
Robert R. Neideck;

Lawrence N. Williamson;
Marie E. Williamson; Estate Of Virgil Burkholder, Dec'd;
Alison M. Burkholder;
Carolyn Rose Burkholder;
Joleen M. (Burkholder) Hurt;
Tim Burkholder; Estate Of John Ayers, Dec'd;
John S. Burd;
Patricia A. Burd;
Jim Mathis;
Paul Nussbaum;
Kurt Evan Bullock;
Elmer Nussbaum;
Jeffrey Dempsey;
Erica L. (Dye) Dyeson;
Harold Snyder;
Ellen Snyder;
James A. Snyder;
Marian S. (Snyder) Willey;
The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Spring Arbor College);
The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Free Methodist Foundation);
Ruth E. White;
Clarence A. Snyder;
Arthur H. Snyder.

Respondent:
ANR Storage Company, a Michigan corporation.

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The Taylor Group respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit on the merits is unreported, and is reproduced in App. A1. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing is unreported and is re-produced in App. B1. The opinion of the United States District Court for the Western District of Michigan granting Defendant's Motion For Summary Judgment is unreported and is reproduced in App. D1. The Judgment of the United States District Court for the Western District of Michigan is unreported and is reproduced in App. E1. The District Court Order Denying Plaintiffs' Motion To Amend Complaint is unreported and is found at App. F1.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on November 8, 2001. A timely petition for rehearing was denied by that court on December 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1). The original cause of action was subject to the federal court jurisdiction by way of federal question

jurisdiction, because it was based upon the Racketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. § 1961 *et seq*. The District Court's jurisdiction was invoked under 28 U.S.C. § 1331 and 18 U.S.C. § 1964©).

STATEMENT OF THE CASE

a. STATEMENT OF FACTS

The action, filed on September 2, 1994, was brought pursuant to the Racketeer Influenced and Corrupt Organization Act of 1970, 18 USC § 1961 *et seq*., and sought treble damages, costs, and attorney's fees pursuant to 18 USC § 1964(c).

Plaintiffs' cause of action stems from the 1983 misrepresentations of Defendant associated with its proposal that Plaintiffs sell their mineral rights to Defendant. The Appellants owned approximately 130 acres of surface and minerals in Blue Lake Township of Kalkaska County, Michigan. The Defendant ANR Storage Company, hereafter "ANR" or "Defendant", was in the natural gas storage business. ANR wanted to acquire the Plaintiffs' mineral interest in the Blue Lake 18A field for the purpose of converting the then producing Blue Lake 18A gas field to gas storage.

The concept of gas storage is simple. It is the temporary warehousing of natural gas in the subsurface in the spring and summer months when natural gas is

generally less expensive for later high volume withdrawal and delivery to the market during demand periods, usually in the late fall and winter months. ANR earned most of its revenue by selling the storage space in its storage fields to other entities to store their gas. The storage is ultimately delivered to end-users via a gas pipeline system running through the United States and Canada.

The Blue Lake 18A field was the fifth Kalkaska County gas field purchased by ANR for conversion to gas storage. Plaintiffs had no involvement in the four prior purchases, however, like the four previous fields, the Blue Lake 18A field produced both gas and natural gas condensate. The existence of such condensate production in the Blue Lake 18A field was a fact known to both Defendant and Plaintiffs. Also, like the other four Kalkaska County fields, the Blue Lake 18A was not only a gas condensate field but was a retrograde gas condensate field; a fact known to Defendant, but not to Plaintiffs. Natural gas condensate is a valuable gasoline like liquid.

The retrograde process is central to this litigation. In a non-retrograde gas condensate field, any liquid hydrocarbons or condensate that condenses out of the gas stream does so only once the gas leaves the well, and as such it is all subject to being recovered at the surface when the gas is produced. In a retrograde gas condensate field; however, as the subsurface pressure in the field declines due to production of gas, a point, the dew point, is reached.

Instead of all the vapor being produced to the surface, a portion of the hydrocarbon vapor starts to condense out in the subsurface. As the pressure further declines, a higher and higher proportion of the hydrocarbon vapor condenses out in the subsurface instead of at the surface. This phenomenon is the opposite of what would normally be expected in a gas field as pressure declines and thus the term "retrograde". It is this subsurface retrograde condensate, which is the focus of the fraud perpetrated upon Plaintiffs by ANR.

ANR's offer to purchase was based upon 9.84 billion cubic feet of "remaining gas in place" plus 45,170 barrels of "remaining condensate" subject to being adjusted based upon actual production as of June 1, 1983. Such an adjustment due to prior under-production and a resultant contingent payment was in fact made by early 1984 on the basis of 51,816 barrels of "remaining condensate".

Plaintiffs in 1992 gained information that Defendant in 1983 had misrepresented the value of remaining condensate. A state court fraud action was commenced in 1993.

The evidence garnered during state court discovery indicates that in reality, in excess of 1.3 million barrels of recoverable condensate remained in the Blue Lake 18A field in 1983 and that the Defendant knew this, but misrepresented this fact to Plaintiffs. The evidence also

shows that the understatement to Plaintiffs of remaining condensate was intended by ANR, knowing full well that at least another 1.3 million barrels remained. The evidence also garnered during such discovery indicated that it was Defendant ANR's modus operandi to intentionally under-represent the quantity of remaining condensate in the previous four gas fields in which it had purchased the mineral rights in Kalkaska County when dealing with the owners of such minerals.

B. COURSE OF PROCEEDINGS

Based upon the state Court discovery, the Plaintiffs initiated their cause of action on September 2, 1994 in the United States District Court for the Western District of Michigan, Southern Division. The action, filed on September 2, 1994, was brought pursuant to the Racketeer Influenced and Corrupt Organization Act of 1970, 18 USC Sec. 1961 *et seq.*, and sought treble damages, costs, and attorney's fees pursuant to 18 USC Sec. 1964(c). Plaintiffs allege, pursuant to the RICO statute that Defendant, and other entities Plaintiffs sought to add as parties Defendant, engaged in an open-ended scheme or enterprise to defraud mineral owners of their property.

On October 31, 1994, Defendant filed a Motion To Dismiss And/Or For Summary Judgment. The Defendant's motion was predicated upon the statute of limitations, *res judicata*, and failure to state a RICO claim. The defense of

res judicata was based upon the dismissal of a previous claim filed by the Plaintiffs in the Kalkaska County, Michigan Circuit Court on January 14, 1993. The state court action alleged fraud against the Defendant ANR based upon false representations by ANR that occurred in 1983, as to the volume of natural gas condensate remaining in the Blue Lake 18A field, which remaining condensate was one of the elements of the consideration due Plaintiffs from Defendant ANR for the sale of their minerals to Defendant. The state trial judge had granted the Defendant's motion to dismiss on November 9, 1993.

In the Plaintiffs' original response to the Defendant's motion for dismissal and/or summary judgment dated November 28, 1994, the Plaintiffs requested leave to amend their complaint. Moreover, on January 18, 1995 Plaintiffs filed a Motion To Amend Complaint.

On January 31, 1995 the trial court, the Honorable Benjamin F. Gibson, issued its opinion and order denying the Defendant's Motion To Dismiss And/Or Summary Judgment without prejudice on the bases of prior adjudication and limitation period. The Court indicated in its Opinion of January 31, 1995 that there was an issue of fact as to whether the doctrine of prior adjudication precluded Plaintiffs' action.

On February 15, 1995 the Defendant filed a Renewed Motion To Dismiss And/Or For Summary

Judgment On The Basis Of Prior Adjudication on the basis that the federal RICO claim was *res judicata*, asserting that Plaintiffs had previously litigated the same claim in the state court action.

Subsequently, on June 2, 1995 the federal district court issued its opinion and order of partial judgment granting the Defendant's motion for summary judgment; that is, the order of partial judgment entered by Judge Gibson dismissed all of the Plaintiffs' claims against the Defendant ANR Storage Company (ANR). At the same time, however, on June 2, 1995, the trial court issued an order allowing the Plaintiffs to amend their complaint to name as Defendants: John R. Milam, Michael Whims, John Kobasa, S. Harold Stocker, Donald Ross, Frederick H. Clark, Amoco Production Company, and ANR Pipeline Company.

The Plaintiffs filed the first amended complaint dated June 7, 1995 but never served any of the newly named Defendants. Plaintiffs filed a notice of appeal on June 29, 1995. This notice of appeal was dismissed by the United States Court of Appeals for the Sixth Circuit by mandate of August 24, 1995 whereby that Court held that Judge Gibson's order of partial judgment dated June 2, 1995 was not a final appealable order pursuant to 28 USC Sec. 1281.

On August 31, 1995, the Plaintiffs filed a motion for certification of order, or in the alternative dismissal. On September 22, 1995 the trial court entered an order of dismissal, dismissing without prejudice all newly named Defendants. Plaintiffs filed a notice of appeal with the Federal District Court on October 17, 1995.

After briefs were filed with the Sixth Circuit Court of Appeals and shortly before oral argument before that Court, the Michigan Supreme Court on July 23, 1996, reversed the Michigan Court of Appeals and the state trial court and remanded the state matter back to the state trial court. Thereupon, the Sixth Circuit Court of Appeals remanded the instant case back to the Federal District Court for further proceedings.

After the Status Conference in the remanded proceedings, Plaintiffs proceeded to file a Second Amended Complaint naming the instant Defendant and eight (8) additional Defendants. After the magistrate judge issued an order dated January 6, 1997 postponing a Rule 16 Scheduling Conference until after answers to the Second Amended Complaint were received by Plaintiffs and the Plaintiffs had informed the Court by letter of the death of Defendant S. Harold Stocker, Defendant ANR, on March 11, 1997, filed an Answer and Affirmative Defenses to Plaintiffs' First Amended Complaint and also filed a Motion to Strike or Dismiss Plaintiff's Second Amended Complaint.

After a Hearing on April 3, 1997 before Magistrate Judge, Hugh W. Brenneman, Jr., on Defendant's Motion, the Magistrate issued an Order dated April 10, 1997 granting Defendants' Motion to Strike or Dismiss Plaintiffs' Second Amended Complaint.

Thereafter, on April 30, 1997, Plaintiffs filed a Motion For Leave To Be Allowed To File A Third Amended Complaint. With the motion, Plaintiffs also filed a Proposed Third Amended Complaint and Demand For Jury Trial.

After a Hearing on May 27, 1997, before the Magistrate Judge, the Judge, by Order dated June 30, 1997, denied Plaintiffs' Motion For Leave To Be Allowed To File Third Amended Complaint.

Meanwhile, on June 9, 1997, Plaintiffs filed a Motion To Amend Complaint and a Proposed Third Amended Complaint naming the Defendant ANR and six (6) additional Defendants.

After a Hearing before the Magistrate Judge on Plaintiffs' Motion To Amend Complaint, the Magistrate Judge issued an Order entered on July 21, 1997, denying Plaintiffs' Motion To Amend Complaint.

On August 1, 1997, Plaintiffs filed objections to Judge Magistrate Brenneman's Order denying Plaintiffs'

Motion To Amend Complaint. Senior Judge Benjamin F. Gibson, by Memorandum, Opinion And Order dated October 6, 1997 affirmed the decision of the Magistrate Judge denying Plaintiffs' Motion To Amend Complaint.

On August 17, 1997 the state trial court granted Defendant a Motion For Summary Disposition[1], based in part upon the statute of limitations for a common law fraud claim. On September 30, 1997 Defendant ANR filed a Motion For Summary Judgment On The Basis Of Prior Adjudication. The Trial Court issued an Opinion and Judgment granting Defendant's motion and dismissing Plaintiffs' case.

Plaintiffs appealed to the Sixth Circuit Court of Appeals as a matter of right the Judgment entered by the Honorable Benjamin F. Gibson on May 7, 1998 which Judgment was based upon the Trial Court's Opinion of the same date. The basis for the district court granting the Defendant's Motion For Summary Judgment was "prior adjudication" or *res judicata* based upon the earlier state court order entered in the Kalkaska County (Michigan) Circuit Court, after a hearing on August 22, 1997 and a formal order of the same date.

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[1] Summary Disposition pursuant to Michigan Court Rule 2.116 is similar to Summary Judgment per Fed R.Civ. P. 56

In its November 8, 2001 Opinion, the United States Court of Appeals for the Sixth Circuit upheld the Judgment of the District Court, but for different reasons than those stated in the District Court Opinion. App. A1. The Sixth Circuit held that the prior state court judgment lost its preclusive effect following the appeal of the state court judgment because the Michigan Court of Appeals only upheld the judgment on the basis of the statute of limitations, a basis which does not meet the merits of the case. Under Michigan law, a prior decision loses its preclusive effect if it is affirmed on appeal on grounds which do not reach the merits. App. A1.

However, the Sixth Circuit upheld the District Court Judgment because the Sixth Circuit found that the Plaintiffs' claims were barred under the doctrine of collateral estoppel. App. A1. Specifically, the Sixth Circuit found that the Michigan Court of Appeals, in upholding the state court judgment on the basis of the statute of limitations, had also found that under the discovery rule Plaintiffs unreasonably relied upon Defendant's initial representations regarding the amount of natural gas condensate remaining in the Blue Lake 18A Field. App. A1. The Sixth Circuit went on the state that reasonable reliance upon a predicate act of mail fraud and wire fraud was an essential element of a RICO claim. App. A1. The Sixth Circuit found that Plaintiffs were collaterally estopped from contesting the Michigan Court of Appeals finding that Plaintiffs had unreasonably relied

upon the Defendant's representations and that, "unlike the doctrine of *res judicata*, a prior judgment on the merits is not an element of collateral estoppel." App. A1. On this basis, the Sixth Circuit upheld the District Court.

REASONS FOR GRANTING THE WRIT

A. THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A CONTROLLING DECISION OF THE MICHIGAN SUPREME COURT.

This Court, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482; 102 S.Ct. 1883, 1897; 72 L.Ed.2d 262 (1982) explains the meaning and importance of the full faith and credit statute, 28 U.S.C. § 1738 as follows:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Id. In other words, this Court has unequivocally held that the United States Court of Appeals for the Sixth Circuit must follow Michigan law regarding collateral estoppel in determining whether Plaintiffs are collaterally estopped from relitigating the issue of whether Plaintiffs unreasonably relied upon the fraudulent representations of Defendant for purposes of the RICO statute. Michigan law states that a prior state court decision must be a judgment on the merits in order for collateral estoppel to apply to a prior decision. The United States Court of Appeals for the Sixth Circuit in this case has previously held that the state court judgment was not a decision on the merits because the Michigan Court of Appeals only upheld the state trial court decision on the basis of the statute of limitations, thereby depriving the decision of preclusive effect. *See, Amalgamated Transit Union, Local 1564 v. Southeastern Michigan Transp. Auth.*, 437 Mich 441; 473 N.W.2d 249, 255 (Mich 1991). Therefore, the prior state court decision has no preclusive effect and the decision of the Sixth Circuit must be reversed by this Court.

The Michigan Supreme Court in *City of Detroit v. Qualls*, 434 Mich 340; 454 N.W.2d 374 (Mich. 1990) ruled that a prior judgment must be a judgment on the merits in order to trigger the doctrine of collateral etoppel on relitigation. *Id.* In *Qualls*, the Plaintiff City of Detroit initially brought suit against defendant for foreiture of

fireworks seized from the defendant's premises alleging defendant's license only permitted him to sell and store legal fireworks in amounts of one hundred pounds or less. *Id.* at 345. The defendant argued that the ordinance was preempted by state law, but the trial court held that the ordinance was valid and judgment was entered against the defendant. *Id.* at 346-347. In a later case the city charged the defendant with misdemeanor violations concerning the storage provisions in the fireworks ordinance. *Id.* at 347. The defendant again raised the issue of the conflict of the ordinance with state law. *Id.* at 348. In holding that the defendant was not precluded from raising the issue of the validity of the ordinance in a prior proceeding, the Michigan Supreme Court stated in footnote 27 of that opinion:

> A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by a summary disposition, *see,* e.g., *Detroit v. Nortown Theatre, Inc*, 116 Mich App 386; 323 NW2d 411 (1982). In fact,
>
> '[i]t would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero . . . . Indeed, a more positive adjudi-cation is hard to imagine.' [18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4444, p 392, n 2, citing *Exhibitors Poster Exchange, Inc v National*

Screen Serv Corp, 421 F2d 1313, 1319 (CA 5, 1970).]

Thus, it is not surprising that the dissent fails to cite any legal authority whatsoever to support this strange contention, and we believe the Court should continue to recognize that, for purposes of collateral estoppel, a ruling rendered on a summary judgment motion will be considered a final disposition on the merits.

Id. at 356, n. 27 (emphasis supplied).

Michigan courts have held that in order to have a prior adjudication that was actually litigated and therefore entitled to preclusive effect under the doctrine of collateral estoppel, there must be an adjudication on the merits. As the Michigan Court of Appeals ruled in *Latimer v. Wm Mueller & Son* 149 Mich App 620, p 641; 386 N.W.2d 618 (1986):

Thus, like a directed verdict after the close of proofs or a motion for summary judgment for failure to state a cause of action, a directed verdict after opening statement, in our view, is a judgment on the merits of an issue actually litigated and is thus entitled to collateral estoppel effect. See 1 Restatement Judgments, 2d, § 27, Comment d, p 255; 46 Am Jur 2d, Judgments, § 515, pp 667-668.

Id. (emphasis supplied)

Finally, the Michigan Court of Appeals in an unpublished opinion, *Crumm v. Addison Community Hospital* 1999 WL 33327162, p 2 (Mich. App.) stated as follows:

> We further conclude that plaintiff is not collaterally estopped from bringing a medical malpractice action against the Crumm III defendants. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid judgment and the issue was actually and necessarily determined in that prior proceeding. *McMichael v. McMichael*, 217 Mich. App 723, 727; 552 NW2d 688 (1996). Because collateral estoppel requires that the issue have been actually determined, judgment on the merits must have been rendered in the first action to prelude relitigation of the issue in the second action. *Detroit v. Qualls*, 434 Mich. 340, 356 n 27; 454 NW2d 374 (1990); *Latimer v. William Mueller & Son, Inc*, 149 Mich. App 620, 640; 386 NW2d 618 (1986). Because the record does not establish that *Crumm I* resulted in an adjudication on the merits of a medical malpractice claim against the *Crumm III* defendants, we hold that collateral estoppel does not preclude plaintiff's claims in *Crumm III*.

Id. (emphasis supplied). Therefore, it is clear that Michigan law demands that a prior adjudication be made on the merits in order for the doctrine of collateral estoppel to apply to bar Appellants' claims. The United States Court of Appeals for the Sixth Circuit has already determined that

the prior state court ruling was not a judgment on the merits and therefore the United States Court of Appeals for the Sixth Circuit committed legal error in upholding the judgment of the United States district Court for the Western District of Michigan.

B. THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO AMEND COMPLAINT ON THE BASIS THAT SUCH AN AMENDMENT WOULD SUBJECT THE DEFENDANT TO DUPLICATIVE DISCOVERY.

The United States Court of Appeals for the Sixth Circuit upheld the trial court's July 21, 1997 Order denying Plaintiffs' Motion To Amend Complaint which named the Defendant and six additional defendants. App. A1. The Sixth Circuit based its ruling on its assertion that:

> Although Defendant ANR and Plaintiffs had stipulated to use the discovery from the state proceeding, the proposed new defendants would have to repeat the discovery process because they were not parties to the proceeding. This would have prejudiced ANR by subjecting it to repeated discovery. Further, one of the key witnesses, the

App. A1.

The Sixth Circuit has abused its discretion in making such a ruling because that court has already determined that duplicative discovery, even when combined with undue delay, does not justify the denial of a Motion To Amend. *Janikowski v. Bendix Corporation*, 823 F.2d 945 (6 Cir. 1987)

As the Sixth Circuit ruled in Janikowski:

> On July 10, 1985, the court declined to grant leave to amend, indicating that the defendant would be prejudiced by the additional and duplicative discovery the amendment would have required, and stressing that the plaintiff had not furnished any reason for the delay in proffering the new theory.
>
> [5] Rule 15(a), Fed. R. Civ. P., provides that leave to amend shall be "freely given" when justice so requires. The thrust of the provision "is to reinforce the principle that cases should be tried on their merits rather than on the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982). Delay that is not intended to harass the defendant is not in itself a permissible reason to refuse leave to amend. *Id.*, at 639, n. 2. Furthermore, there must be "at least some significant showing of prejudice to the opponent" if the motion is to be denied. Moore v. City of

Paducah, 790 F.2d 557, 562 (6th Cir.1986). Although this court reviews denials of leave to amend only for abuse of discretion, it should be emphasized that the case law in this Circuit manifests "liberality in allowing amendments to a complaint." *Id.*

In this instance there is simply no showing of prejudice to Bendix sufficient to preclude plaintiff from introducing his contract claim. In the brief Bendix filed with the district court opposing the motion for leave to amend, the only claim of prejudice was that "Bendix would ... be put to the expense of conducting a second round of discovery including re-deposing Plaintiff."

. . .

Although prejudice has been found in cases where the motion for leave to amend was filed after completion of discovery, Roberts v. Arizona Board of Regents 661 F.2d 796, 798 (9th Cir.1981); Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 667 (5th cir.) cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981), no such fact pattern is present here. <u>The proper remedy for subjecting Bendix to duplicative discovery would be to require the amending party to bear a portion of the additional expense.</u> Local 783, Allied Industrial Workers of America, AFL-CIO v. General Electric Co., 471 F.2d 751, 756 (6th Cir.), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973).

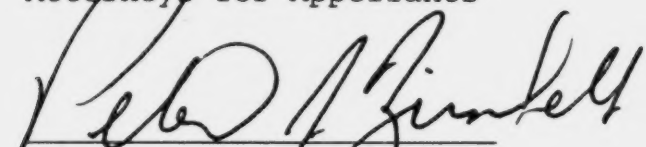
Id. at 951, 952). At worst, the Sixth Circuit should have reversed the decision of the trial court denying Appellants' motion to amend and required the Appellants to pay for the cost of any unfair duplicative discovery. The Sixth Circuit ignored its precedent in this matter and abused its discretion in upholding the trial court.

Additionally, the Sixth Circuit's mention of a "key witness" that had died is irrelevant to the decision to deny Appellant's motion to amend. This witnesses' name is S. Harold Stocker. Mr. Stocker was not a Defendant and not an employee of Appellee ANR, but a former employee of proposed Defendant Amoco Production Company. In addition, as the Sixth Circuit states, Mr. Stocker was merely the author of an opinion letter dated May 19, 1983 subsequent to Plaintiffs' acceptance of Defendant's offer, regarding the "fairness of ANR's offer in 1983." It is Appellee ANR's misrepresentations to Appellants that is at issue in the Sixth Circuit's Opinion and there is no evidence that Mr. Stocker's death will prejudice the Appellee ANR. The Sixth Circuit abused its discretion in denying the Appellant's motion to amend its complaint and this Court should reverse the Sixth Circuit accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

PETER J. ZIRNHELT, P.C.
Attorneys for Appellants



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NOT FOR PUBLICATION

No. 98-1 671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE TAYLOR GROUP, et al,
Plaintiffs-Appellants,

v.

ANR STORAGE COMPANY,
Defendant-Appellee.

On Appeal From The United States District Court
For The Western District of Michigan

BEFORE: JONES, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

SUHRHEINRICH, Circuit Judge: Plaintiffs appeal the grant of summary judgment in favor of Defendant ANR Storage Company ("ANR") on Plaintiffs's RICO claim under 18 U.S.C. §§ 1961-1968. The district court granted summary judgment to Defendant after finding that Plaintiffs were barred by *res judicata* from asserting this claim because of a prior adjudication in Michigan state court in an action in which they could have brought this claim. Plaintiffs argue that (1) *res judicata* does not apply because the prior state suit was not adjudicated on its merits but on the basis of a statute of limitations; (2) *res judicata* does not apply because ANR did not object to Plaintiffs' failure to join claims, as required under state law; (3) *res judicata* does not apply because the

issues in this case are not identical to those in the prior state action; and (4) the court abused its discretion in denying Plaintiffs' motion to amend their Complaint. We **AFFIRM** the judgment of the district court.

I. BACKGROUND

Plaintiffs are the Taylor Group and about fifty other people or their estates or trusts that purchased property in Kalkaska County, Michigan, around 1970. After natural gas was discovered in the area, the Taylor Group received about $40,000.00 per month for several years in royalties. As the natural gas reservoir began to be depleted, Defendant ANR became interested in using it as a storage reservoir. In 1983, ANR began acquiring mineral and storage rights from some of the owners. Plaintiffs, after seeking the advice of their well operator, accepted ANR's offer and received payment.

ANR's plans to convert the reservoir to a storage facility were indefinitely delayed when the Federal Energy Regulatory Commission ("FERC") refused to approve the project. However, later in 1991, ANR again applied for and received FERC certification. ANR then resumed negotiating with the owners of the remaining mineral rights, who had not sold their interests in 1983.

When Plaintiffs learned of ANR's renewed negotiations, they complained to ANR that it should have calculated its 1983 offer to them to reflect additional gas condensate present in the field, which they claimed that ANR knowingly failed to disclose in 1983.

On January 14, 1993, Plaintiffs sued ANR in state court alleging that ANR defrauded them in 1983 by misrepresenting to them the amount of natural gas condensate remaining in the reservoir. The state court granted ANR's motion to dismiss on February 7, 1994. On September 2, 1994, Plaintiffs sued ANR in federal district court alleging that ANR and other entities violated the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968, by using the United States postal service in an open-ended scheme or enterprise to defraud mineral owners of their property, thereby violating RICO.

Defendant moved for summary judgment on October 31, 1994, contending that (1) the statute of limitations barred the RICO action, (2) *res judicata* barred the RICO action, and (3) Plaintiffs had failed to state a RICO claim. The district court denied the motion because a genuine issue of material fact existed as to whether *res judicata* barred the action. Plaintiffs claimed that they learned of their RICO claim during discovery in the state case but could not raise it because the state trial court did not allow them to amend their pleading.

On February 15, 1995, Defendant again moved for summary judgment claiming that *res judicata* barred Plaintiffs' RICO claim and submitted additional briefing and documentary evidence as to Plaintiffs' knowledge of its potential RICO claim. On June 2, 1995, the district court granted Defendant's motion for summary judgment based on the additional briefing and documentary evidence. However, the district court also permitted Plaintiffs to amend their Complaint and add new Defendants.

On June 7, 1995, Plaintiffs filed their amended complaint adding new Defendants but did not serve them. Rather, on June 29, 1995, Plaintiffs appealed the summary judgment. This Court dismissed the appeal on August 24, 1995, finding that the order was not a final appealable order. on August 31, 1995, Plaintiffs voluntarily dismissed the Defendants that they had added on June 7, 1995, but never served, in order to appeal the summary judgment as a final order.

Meanwhile in state court, the Michigan Court of Appeals had affirmed the trial court's dismissal of Plaintiffs's claim. But on July 23, 1996, the Michigan Supreme Court reversed the appellate court and remanded the case to the trial court. Thereupon, this Court also remanded this case to the district court for further proceedings. After a status conference in the district court, Plaintiffs filed a Second Amended Complaint, naming ANR and eight additional Defendants.

On April 30, 1997, and on June 9, 1997, Plaintiffs moved for leave to file a Third Amended Complaint, which the district court denied on July 2, 1997, and July 21, 1997, respectively. On September 16, 1997, the state trial court dismissed Plaintiffs' case because (1) fraud could not be shown under Michigan law since ANR owed no legal duty to disclose all information in its possession pertinent to the Plaintiffs' reservoir; (2) ANR did nothing to hinder Plaintiffs from obtaining an independent appraisal; and (3) Plaintiffs' claim was barred by the statute of limitations. Based on the dismissal of the state case, ANR again moved for summary

judgment in the federal case on the basis of *res judicata*. On May 7, 1998, the district court granted summary judgment to ANR.

Meanwhile, Plaintiffs appealed the dismissal of their claim in state court. After the district court had granted Defendant summary judgment, the Michigan Court Appeals affirmed the circuit court - but only on the grounds of the statute of limitation. Plaintiffs applied for leave to Michigan Supreme Court, which denied leave.

II. DISCUSSION

Plaintiffs raise four issues on appeal. Three of the issues involve prior adjudication. A fourth deals with their attempt to amend their complaint.

A. Prior Adjudication

State judgments "have the same full faith and credit" in federal courts as "they have by law or usage in the courts of such state." 28 U.S.C. §1738. Further, "when state-federal jurisdiction is concurrent on the federal Claim, the law of the state in which an earlier judgment is rendered governs its preclusive effect on factual issues raised in a subsequent federal action." *Kaufman v. BDO Soidman*, 984 F.2d 182, 183 (6th Cir. 1993). In Michigan, claim preclusion bars a subsequent action when (1) the prior action was decided on the merits, (2) the claim in the subsequent action was resolved in the prior action, or arose from the same transaction and could have been resolved in the prior action, and (3) both actions involve the same parties or their privies. *Bd. of County Rd. Comm'rs v. Schultz*, 521 N.W.2d 847, 850 (Mich.

Ct. App. 1994). Actions arise from the same transaction if the same facts or evidence are essential to the maintenance of the two actions. *Schwartz v. City of Flint*, 466 N.W.2d 357, 360 (Mich. Ct. App. 1991).

Plaintiffs contend that the district court improperly dismissed their suit on the basis of *res judicata* for three reasons: (1) the prior state action was not decided on the merits; (2) the instant action and the prior state action arose from different transactions; and (3) ANR waived its *res judicata* defense by failing to request joinder of claims in the state proceeding under Michigan Court Rule 2.203(A)(2).

We observe that initially the federal district court properly granted summary judgment to Defendant on the basis of *res judicata* when it relied on the prior judgment of the state trial court. The state trial court had found for Defendant both on the merits of Plaintiffs' claims and on the basis of the statute of limitations. However, under Michigan law a prior decision may lose its preclusive effect if it is affirmed on appeal solely on grounds that are not on the merits. *Amalgamated Transit Union, Local 1564 v. Southeastern Michigan Transp. Auth.*, 473 N.W.2d 249, 255 (Mich. 1991); *see* also 18 *James Wm. Moore et al.*, Federal Practice ¶ 131 .30[2][c][iii] (3d ed. 2001). Further, under Michigan law, a decision on the basis of the statute of limitations is not a decision on the merits. *Bd. of County Rd. Comm'rs v. Schultz*, 521 N.W.2d 847,850 (Mich. Ct. App. 1994).

Here, the Michigan Court of Appeals limited its review of Plaintiffs' appellate issues to the statute of limitation and affirmed the trial court solely on the basis of

the statute of limitations. *Taylor Group v. ANR Storage Co.*, No. 206534, slip op. at 4 (Mich. Ct. App. July 13, 1999), *leave denied, Taylor Group v. ANR Storage Co.*, 622 N.W.2d 524 (Mich. 2000). Thus, the state court judgment lost its preclusive effect on appeal because it was no longer decided on the merits. Accordingly, *res judicata* does not bar Plaintiffs' RICO action in federal court. Because we have decided that *res judicata* does not apply on this basis, we need not discuss Plaintiffs other two arguments.

Nevertheless, on a close reading of the Michigan Court of Appeals' opinion, we find that another doctrine of prior adjudication, collateral estoppel, applies and precludes relitigation of the fact and time of Plaintiffs' unreasonable reliance on Defendant's alleged mail and wire fraud. The adjudicated fact that Plaintiffs' reliance was unreasonable precludes a finding of Plaintiffs' reasonable reliance on Defendant's alleged mail and wire fraud, which is an essential element of Plaintiffs' RICO claim. The adjudicated fact that Plaintiffs reasonably should have known of this alleged misrepresentation in 1983, also time-bars Plaintiffs' RICO claim as outside of RICO's four-year limitation period. Although the parties did not brief this issue, we may affirm a grant of summary judgment for different reasons than those set forth in the district court if the alternative grounds have adequate support in the record. *Babcock & Wilcox Co. v. Arkwtight-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767 (6th Cir. 1995).

Collateral estoppel balances judicial economy, i.e., "the need to eliminate repetitious and needless litigation," and the interests of litigants in a "full and fair adjudication "of their claims. *Storey v. MeUer, Inc* ., 429 N.W.2d 169, 171

(Mich. 1988); *Howell v. Vito's Trucking & Excavating Co.*, 191 N.W.2d 313, 318-19(Mich. 1971); *Senior Accountants, Analysts & Appraisers Assoc. v. Detroit*, 249 N.W.2d 121, 124-25 (Mich. 1976). Specifically, issue preclusion "precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *People v. Gates*, 452 N.W.2d 627, 630 (Mich. 1990); *McMichael v. McMichael* , 552 N.W.2d 688,690 (Mich. Ct. App. 1996); *Porter v. Royal Oak*, 542 N.W.2d 905, 908 (Mich. Ct. App. 1995). Unlike *res judicata*, a prior judgment on the merits is not an element of collateral estoppel. The issue in the second action must be the same issue as in the first action. Detroit v Quails, 454 N.W.2d 374 (Mich. 1990); *Wilcox v Sealey* , 346 N.W.2d 889 1984). Further, the issue in the first action must have been essential to the resulting judgment. If the judgment did not depend on resolving that issue, collateral estoppel does not apply. *Quails*, 454 N.W.2d at 391; *People v Gates* , 452 NW2d at 639 (1990). Also, collateral estoppel generally requires mutuality. *Howell v. Vito's Trucking & Excavating Co.*, 191 N.W.2d 313, 315-16 (Mich. 1971); *Barrow v. Pritchard*, 597 N.W.2d 853, 855-56 (Mich. Ct. App. 1999). Collateral estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Howell*, 191 N.W.2d at 315.

A RICO claim requires proof of two or more predicate offenses that formed a pattern of racketeering activity and involved an enterprise that was connected to the racketeering activity, which injured a plaintiffs business or property. 18 U.S.C. § 1961-1964; *VanDen Broeck v. Commonpoint*

Mortgage Co., 210 F.3d 696,699(6th Cir. 2000). Section 1961(1) defines racketeering activity to include mail fraud and wire fraud. 18 U.S.C. §§ 1341, 1343. Plaintiffs allege mail fraud and wire fraud as the predicate acts for their RICO claim. Mail fraud and wire fraud require showing a scheme to defraud using either a mailing or a wire communication to execute the scheme. 18 U.S.C. §§ 1341, 1343. Under RICO, an element of both mail fraud and wire fraud is reliance on the fraudulent representation. *VanDen Broeck*. 210 F.3d at 701; *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 321-323 (6th Cir. 1999); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 389-90(6th Cir. 1996); *Central Distrib. of Beer, Inc. v. Conn*, 5 F.3d 181, (6th Cir. 1993); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir.1987).

In affirming the state circuit court's ruling that the statute of limitation had run on Plaintiffs' fraud claim, the Michigan Court of Appeals found that under the discovery rule, Plaintiffs should have known in June 1983 that Defendant's representations were fraudulent because their reliance on the representations were not reasonable. In rejecting Plaintiffs' arguments, the Michigan Court of Appeals reasoned as follows:

> We agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983. . . . [T]he question is not whether plaintiffs were actually induced by Ross not to verify the accuracy of defendant's estimate of the value of plaintiffs' mineral rights, rather, whether their reliance on Ross' representations was reason-able

> under the circumstances of this case. In our opinion, the exercise of reasonable diligence should have caused plaintiffs to seek an independent appraisal of the volume of natural gas condensate remaining in their own property, notwithstanding the representation of Ross.

Taylor Group v. ANR Storage Co., No. 206534, slip op. at 4 (Mich. Ct. App. July 13, 1999).

This finding satisfies all the elements of collateral estoppel. In order to affirm the state circuit court on the basis of the statute of limitations, the Michigan Court of Appeals had to review when Plaintiffs' claim accrued, which in this case occurred when Plaintiffs reasonably should have known of their alleged claim against Defendant. The issue when Plaintiffs reasonably should have known of their claim was actually litigated and necessarily determined by the state courts in finding that the statute of limitations barred Plaintiffs' claim. Further, this finding was part of a final judgment of the state trial and appellate courts on which the Michigan Supreme Court denied leave. Moreover, the judgment appears valid in all respects. Finally, as a party to that action, Defendant would have been bound by the decision had it been decided Plaintiffs' favor. Accordingly, as a matter of collateral estoppel, Plaintiffs did not reasonably rely on Defendant's allegedly fraudulent representations and should have known of their potential RICO claim in 1983. Therefore, Plaintiffs cannot show in the present case that they reasonably relied on Defendant's alleged fraudulent conduct for purposes of their RICO claim, which is an essential element of their RICO claim. Therefore, we **AFFIRM** the

summary judgment of district court, but on different grounds than the district court relied used.

We also find that, just as Plaintiffs' state law fraud claim was barred by the statute of limitations, so is their RICO claim. A civil RICO action has a four-year limitation period. *Rotella v. Wood*, 528 U.S. 549 (2000); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The limitations period for RICO claims accrues when a plaintiff knew or should have known of an injury. *Rotella*, 528 U.S. at 554-55.[1] As the Michigan Court of Appeals determined, "[w]e agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983." Applying the four-year statute of limitations to Plaintiffs' RICO claim requires that Plaintiffs would have had to file their RICO claim by June of 1987. However, Plaintiffs did not file their RICO claim until 1994, well after the statute of limitations had run. Accordingly, their RICO claim is time barred. Therefore, we also AFFIRM the summary judgment of district court on another basis than that relied on by the district court.

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[1]Before *Rotella*, this Circuit applied the "injury and pattern discovery rule," under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. *See, e.g., Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-620 (6th Cir. 1994). Application of the injury and pattern discovery rule would not have delayed the accrual of the statute because discovery of Ross' alleged misrepresentation would have implicated the alleged pattern of racketeering activity.

B. Denial of Leave to File Third Amended Complaint Was Proper

Plaintiffs also claim that the district court erred by denying their motion for leave to file a Third Amended Complaint. The Third Amended Complaint proposed adding the same defendants that Plaintiffs had voluntarily dismissed in order to create a final, appealable order. We review a district court's denial of a motion to amend for abuse of discretion. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 522 (6th Cir. 1999).

Under Fed R. Civ. P. 15(a), leave to amend shall be "freely given when justice so requires." Courts construe Rule 15(a) liberally. *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987). Rule 15(a) reinforces "the principle that cases should be tried on their merits rather than on the technicalities of pleadings." *Id.* (quoting *Teffi v. Seward*, 689 F.2d 637, 639 (6th Cir.1982)). Nevertheless, this Court may affirm a denial of a motion to amend a pleading where there is undue delay, bad faith, dilatory motive, undue prejudice, repeated failure to cure deficiencies in the pleading, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178,182(1962); *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973).

Here, after litigating in state court, Plaintiffs filed in federal court. Then almost three years after filing their initial Complaint, which they had already amended twice, they moved for leave to file their proposed Third Amended Complaint. This delay would have prejudiced Defendant.

While substantially the same as their First Amended Complaint, Plaintiffs' Third Amended Complaint adds defendants that they had previously voluntarily dismissed. Although Defendant ANR and Plaintiffs had stipulated to use the discovery from the state proceeding, the proposed new defendants would have to repeat the discovery process because they were not parties to the state proceeding. This would have prejudiced ANR by subjecting it to repeated discovery. Further, one of the key witnesses, the author of an opinion letter on the fairness of ANR's offer in 1983, had died. After considering this protracted proceeding and its consequent prejudice, we cannot find that the district court abused its discretion in denying Plaintiffs' motion for leave to file a Third Amended Complaint.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Case No: 98-1671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

THE TAYLOR GROUP, et al.
Plaintiffs - Appellants,

v.

ANR STORAGE COMPANY,
Defendant - Appellee.

BEFORE: JONES, SUHREINRICH, and DAUGHTREY, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 98-1671

Filed December 28, 2001

THE TAYLOR GROUP, et al.,

Plaintiffs - Appellants,

v.

ANR STORAGE COMPANY,

Defendant - Appellee.

MANDATE

Pursuant to the court's disposition that was filed 11/8/01 the mandate for this case hereby issues today.

A True Copy.

COSTS: **NONE**

Attest:

Filing Fee.....$
Printing .....$
Total .....$

/s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP; et al,
Plaintiffs, **File No. 1:94-CV-600**
The Honorable
v. **Benjamin F. Gibson**

ANR STORAGE COMPANY, **OPINION**
Defendant.

/

This is an action under the Racketeering Influenced and Corrupt Organization Act of 1970, 18 U.S.C. SS 1961, *et seq*. ("RICO"), in which plaintiffs allege that defendant ANR Storage Company ("ANR"), a natural gas storage company, defrauded plaintiffs of the value of their mineral rights by misrepresenting the amount of gas condensate recoverable from plaintiffs' property. Before the Court is defendant's motion for summary judgment. Defendant argues that prior adjudication bars plaintiffs' claim. For the following reasons, the Court will grant defendant's motion.

I.

After plaintiffs filed their RICO action in this Court on September 2, 1994, defendant requested summary judgment, contending that the action was barred by a grant of summary disposition in plaintiffs' common-law fraud action against defendant in state court. On January 31, 1995, the

Court denied defendant's motion without prejudice. Upon further briefing, the Court found that no genuine issue of fact existed and granted defendant's renewed motion for summary judgment on June 2, 1995.

Thereafter, the Michigan Supreme Court reversed the Order granting summary disposition in the state court action. Accordingly, the Sixth Circuit Court of Appeals vacated this Court's June 2, 1995, Order granting summary judgment, since that Order was based upon the state court's grant of summary disposition. Defendant filed another motion for summary disposition in state court and on August 22, 1997, the state court granted defendant's motion and entered judgment for defendant in the state common-law fraud case. Defendant now requests that the Court enter summary judgment in its favor based upon the state court's August 22, 1997, Order.

II.

Plaintiffs oppose defendant's motion on two grounds, both of which the Court addressed in its June 2, 1995, Opinion granting defendant's previous motion for summary judgment based on prior adjudication. The Court incorporates by reference the June 2, 1995, Opinion, a copy of which is attached.

First, plaintiffs declare that the issues raised in this case are not issues resolved in the state court action. Plaintiffs contend that the elements of the state common-law

fraud claim and the RICO claim are different and conclude that the evidence necessary to prove the two claims are not the same. In the June 2, 1995, Opinion, the Court rejected this argument, finding that "[p)laintiffs' RICO claim arises in part out of the same cause of action as their state law fraud claim" and that plaintiffs' "state law fraud and RICO claims are based on the same cause of action--defendant's allegedly fraudulent representations to them." June 2, 1995, Opinion at 3, 3 n. 1. The Court declines to alter its ruling on this point.

Second, plaintiffs argue that they could not have raised their RICO claim in state court. previously, plaintiffs argued that they learned of the potential for a RICO action in May 1993. Plaintiffs now assert that their prior statement was erroneous and that, in fact, they became aware of facts upon which to base a RICO action in September 1993. Plaintiffs argue that they were unable to "digest" this information until after the state court granted defendant's motion for summary disposition in February 1994.

In the June 2, 1995, Opinion, the Court found, based upon plaintiffs' briefing, that their RICO claim accrued in May 1993. The Court found that between May 1993 and February 1994, when the state court case initially con-cluded, plaintiffs had time in which to move to amend their complaint to add a RICO claim. Even accepting plaintiffs' new argument that the RICO claim did not accrue until the end of September 1993, the Court finds that plaintiffs had ample

time in which to analyze the discovery information and move to amend their complaint to add a RICO claim. As discussed in the June 2, 1995, Opinion, plaintiffs have failed to demonstrate that a motion to amend would have been futile. Accordingly, the Court again concludes that plaintiffs could have attempted to litigate their RICO claim in state court, but that they simply did not do so.

III.

For the reasons set forth above and in the June 2, 1995, Opinion, the Court finds that plaintiffs' RICO claim is barred by the state court adjudication. **The Court therefore will grant defendant's motion for summary judgment.**

s/s_____
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

Dated: May 7, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP, et al., **File No. 1:94-CV-600**

Plaintiffs, **Hon. Benjamin F. Gibson**

v.

ANR STORAGE COMPANY, **JUDGMENT**

Defendant.
_____/

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 7th day of May, 1998.

PRESENT: THE HONORABLE BENJAMIN F. GIBSON, SENIOR UNITED STATES DISTRICT JUDGE

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that ANR Storage Company's motion for summary judgment (pleading no. 104) is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant ANR Storage Company.

IT IS SO ORDERED.

/s/_____
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP, et al.,	**File No. 94-CV-600**
Plaintiffs,	**Hon. Benjamin F. Gibson**
v.	
ANR STORAGE COMPANY,	**ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT**
Defendant.	
_____/	

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_____/

A hearing was held on Plaintiffs' Motion to Amend Complaint on Wednesday, July 2, 1997, at 9:30 a.m. at the

Federal Building in Grand Rapids, Michigan. The Court considered the pleadings filed by the parties except those submitted by Amoco and oral argument presented at the hearing. For the reasons stated on the record during the hearing on this matter, Plaintiffs' motion is DENIED.

Dated: July 14, 1997 /s/_____
Hon. Hugh W. Brenneman, Jr.
United States Magistrate Judge

APPROVED AS TO FORM FOR ENTRY:

/s/_____
Richard P. Carroll (P-38807)
Attorneys for Plaintiffs

/s/_____
John M. DeVries (P-12732)
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TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 1961 (2002)

§ 1961. Definitions

As used in this chapter [*18 USCS § § 1961* et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]),* which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section

1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318

(relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title *29, United States Code, section 186* (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]),* punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [*8 USCS § 1324]* (relating to bringing in and harboring certain aliens), section 277 [*8 USCS § 1327]* (relating to aiding or assisting certain aliens to enter the United States), or section 278 [*8 USCS § 1328]* (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [*18 USCS § § 1961* et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [*18 USCS § § 1961* et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [*18 USCS § § 1961* et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [*18 USCS § § 1961* et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [*18 USCS § § 1961* et seq.] either the investigative provisions of this chapter [*18 USCS § § 1961* et seq.] or the investigative power of such department or agency otherwise conferred by law.

HISTORY: (Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P.L. 95-598, Title III, § 314(g), 92

Stat. 2677; Oct. 12, 1984, P.L. 98-473, Title II, Ch IX, § 901(g), Ch X, Part N, § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P.L. 98-547, Title II, § 205(1), (2), 98 Stat. 2770; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle H, § 1365(b), 100 Stat. 3207-35; Nov. 10, 1986, P.L. 99-646, § 50(a), 100 Stat. 3605; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § § 7013, 7020(c), 7032, 7054, Subtitle N, Ch 1, § 7514, 102 Stat. 4395, 4396, 4398, 4402, 4489; Aug. 9, 1989, P.L. 101-73, Title IX, Subtitle F, § 968, 103 Stat. 506.)

(As amended Nov. 29, 1990, P.L. 101-647, Title XXXV, § 3560, 104 Stat. 4927; Sept. 13, 1994, P.L. 103-322, Title IX, Subtitle A, § 90104, Title XVI, § 160001(f), Title XXXIII, § 330022(1), 108 Stat. 1987, 2037, 2051; Oct. 22, 1994, P.L. 103-394, Title III, § 312(b), 108 Stat. 4140; April 24, 1996, P.L. 104-132, Title IV, Subtitle D, § 433, 110 Stat. 1274; July 2, 1996, P.L. 104-153, § 3, 110 Stat. 1386; Sept. 30, 1996, P.L. 104-208, Div C, Title II, Subtitle A, § 202, 110 Stat. 3009-565; Oct. 11, 1996, P.L. 104-294, Title VI, § § 601(b)(3), (i)(3), 604(b)(6), 110 Stat. 3499, 3501, 3506; Oct. 26, 2001, P.L. 107-56, Title VIII, § 813, 115 Stat. 382.)

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 1964 (2002)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor

in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [*18 USCS § § 1961* et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

HISTORY: (Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 943; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(24)(A), 98 Stat. 3359.)
(As amended Dec. 22, 1995, P.L. 104-67, Title I, § 107, 109 Stat. 758.)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 81. SUPREME COURT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1254 (2002)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 85. DISTRICT COURTS; JURISDICTION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1331 (2002)

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P.L. 96-486, § 2(a), 94 Stat. 2369.)

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

USCS Fed Rules Civ Proc R 56 (2002)

Review expert commentary from The National Institute for Trial Advocacy
Review Court Orders which may amend this Rule.

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

HISTORY: (Amended March 19, 1948; July 1, 1963; Aug. 1, 1987.)

RULE 2.116 SUMMARY DISPOSITION

(A) Judgement on Stipulated Facts.

(1) The parties to a civil action may submit and agreed-upon stipulation of facts to the court.

(2) If the parties have stipulated to facts sufficient to enable the court to render judgement in the action, the court shall do so.

(B) Motion.

(1) A party may move for dismissal of or judgement on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2912c; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(1) The court lacks jurisdiction over the person or property.

(2) The process issued in the action was insufficient.

(3) The service of process was insufficient.

(4) The court lacks jurisdiction of the subject matter.

(5) The party asserting the claim lacks the legal capacity to sue.

(6) Another action has been initiated between the same parties involving the same claim.

(7) The claim is barred because of release, payment, prior judgement, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

(8) The opposing party has failed to state a claim on which relief can be granted.

(9) The opposing party has failed to state a valid defense to the claim asserted against him or her.

(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgement or partial judgement as a matter of law.

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

(1) The grounds listed in subrule (C)(1),(2), and (3)

must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived.

(2) The grounds listed in subrule (C)(5),(6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.

(3) The grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time.

(E) Consolidation; Successive Motions.

(1) A party may combine in a single motion as many defenses or objections as the party has based upon any of the grounds enumerated in this rule.

(2) No defense or objection is waived by being joined with one or more other defenses or objections.

(3) A party may file more than one motion under this rule, subject to the provisions of subrule (F).

(F) Motion or Affidavit Filed in Bad Faith. A party or an attorney found by the court to have files a motion or an affidavit in violation of the provisions of MCR 2.114 may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt.

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

(b) If the court sets a different time for filing and serving a motion or a response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion or response (including brief and any affidavits) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(2) Except as to a motion based on a subrule (C)(8) or (9), affidavits, depositions, admissions or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion.

(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required.

(a) when the grounds asserted do not appear on the face of the pleadings, or

(b) when judgment is sought based on subrule (C)(10).

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

(5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).

(6) Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

(H) Affidavits Unavailable.

(1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must:

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

(2) When this kind of affidavit is filed, the court may enter an appropriate order, including and order

(a) denying the motion, or

(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

(I) Disposition by Court; Immediate Trial

(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court

may render judgment in favor of the opposing party .

(3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

(4) The court may postpone until trial the hearing and decision on a matter involving disputed issues of fact brought before it under this rule.

(5) If the grounds asserted are based on subrule (C)(8); (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.

(J) Motion Denied; Case Not Fully Adjudicated on Motion.

(1) If a motion under this rule is denied, or if the decision does not dispose of the entire action or grant all the relief demanded, the action must proceed to final judgment. The court may:

(a) set the time for further pleadings or amendments required;

(b) examine the evidence before it and, by questioning the attorneys, ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed; and

(c) set the date on which all discovery must be completed.

(2) A party aggrieved by a decision of the court entered under this rule may:

(a) seek interlocutory leave to appeal as provided for by these rules;

(b) claim an immediate appeal as of right if the judgment entered by the court constitutes a final judgment under MCR 2.604(B); or

(c) proceed to final judgment and raise errors of the court committed under this rule in an appeal taken from final judgment.

(2)

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

No. 01-1428

In the Supreme Court of the United States

THE TAYLOR GROUP, AN INDIANA GENERAL PARTNERSHIP, ET AL.,
Petitioners,

v.

ANR STORAGE COMPANY, A MICHIGAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT ANR STORAGE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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75pp

QUESTIONS PRESENTED

The Taylor Group misstates both questions presented to the Court by the Petition. The applicable and controlling state law does not require a judgment "on the merits" as an element of collateral estoppel, as assumed in the phrasing of the first question. More properly stated, the first question raised by the Taylor Group's Petition is:

> Whether controlling state law holds that a prior judgment on the merits is an element of collateral estoppel (issue preclusion) and, if so, whether the federal court erred in not recognizing that element.

The federal court did not deny Plaintiff's Motion to Amend solely on the basis of duplicative discovery, as assumed in the phrasing of the second question. More properly stated, the second question is:

> Whether the federal court abused its discretion in denying Plaintiff's motion for leave to file an amended complaint where leave to amend had been granted several times in the past, where the amendment proposed to add parties who had been voluntarily dismissed in the past, where duplicative discovery would have been necessary, and where a material witness has died during the delay in seeking leave to amend.

PARTIES TO THE PROCEEDINGS

To the best of Respondent ANR Storage Company's knowledge, information and belief, Petitioners have correctly listed the parties.

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OPINIONS BELOW

Taylor Group has correctly listed and cited the opinions and orders entered in this case which were appealed.

In addition, the R.49 district court's June 2, 1995 Opinion, reproduced at App M.1a, the R.118 transcript of the Kalkaska County Circuit Court decision dated August 22, 1997, Case No. 93-4776-NZ(M), reproduced at App N.1a, and the unpublished decision of the Michigan Court of Appeals affirming that dismissal dated July 13, 1999, reproduced at App O.1a, should have been included pursuant to Supreme Court Rule 14.1(i)(ii).

JURISDICTION

Respondent ANR Storage Company acknowledges that this Court has jurisdiction by virtue of the statutes relied upon by Taylor Group.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The statement of facts in the Petition for Writ of Certiorari, pages 2-5, purporting to describe the underlying mineral sale transaction between Plaintiffs (hereinafter "Taylor Group") and Defendant ANR Storage Company (hereinafter "ANR"), does not accurately set out the facts material to the consideration of the questions presented. Rather, Taylor Group has repeated and exaggerated the allegations made in its complaints, which are not supported by the record. Taylor Group also omits facts which are adverse to the Taylor Group and on the basis of which the state trial court granted summary disposition (the equivalent of Rule 56 summary judgment) in favor of ANR. ANR continues to vigorously dispute Taylor Group's allegations and characterization of ANR's offer to purchase, particularly with regard to the claim that ANR made fraudulent misrepresentations.

While the details regarding the 1983 sale of property owned by Taylor Group to ANR are not critical to the decision whether or not to grant this Petition for Writ of Certiorari, some background facts may be helpful to understand what was alleged, litigated and decided in the state and federal trial and appellate courts.

In approximately 1970, a group of people who are, or were, faculty members at or otherwise affiliated with Taylor University in Indiana formed a partnership called the Taylor Group and purchased recreational property in Blue Lake Township, Kalkaska County, Michigan for $30,000. Shortly thereafter, the Blue Lake 18A natural gas field was discovered under the Taylor Group's and adjoining properties. Soon

Taylor Group was receiving about $40,000 per month in natural gas and condensate royalty. The original Taylor Group partners assigned some of their interest to the remaining Plaintiffs for tax purposes. As the Blue Lake 18A gas field neared depletion, ANR became interested in the possibility of using the reservoir as a "husbanding" storage reservoir where gas which ANR was forced to purchase under long-term high-priced "take or pay" contracts (but could not pass on to its customers under Federal Energy Regulatory Commission ("FERC") Order) could be injected and stored during the period of over-supply, to be retrieved later when market conditions permitted.

In early 1983, ANR filed an application with FERC for approval of this project. At the same time, pursuant to the requirements of the Michigan Uniform Condemnation Procedures Act, ANR calculated what it believed was the market value of the mineral rights it sought to acquire and mailed written offers to the land owners, including Taylor Group. The offers disclosed the assumptions ANR used to calculate the just compensation offered. Taylor Group reacted to the offer by seeking the advice of its gas well operator, Amoco Production Company, as well as the advice of Peninsular Oil Company president-geologist George McAlleenen, the chief executive of its oil and gas lessee. Both Amoco and Mr. McAlleenen assured Taylor Group that the offer from ANR was "a good one." Taylor Group owned the property involved in the purchase and sale transaction, had access to all of the production records and other documentation related to the property and could have conducted tests or any other investigation. Taylor Group also had the sophistication and the financial wherewithal to conduct a thorough evaluation of ANR's offer before accepting it. Ultimately, Taylor Group accepted the offer and received payment in Spring, 1983.

After ANR had acquired some (including the Taylor Group's) mineral interest in the storage formation, ANR's plans to convert the natural gas field to a "husbanding" storage facility were indefinitely put on hold because the FERC declined to approve the project. About eight years later, ANR tried again to acquire FERC approval to convert the field to a typical cyclical storage field and, this time, the application was granted.

In 1991, Taylor Group apparently became aware that ANR was negotiating with the remaining mineral rights interest holders and, for the first time, complained that ANR should have calculated its 1983 offer price differently by attributing additional value to the condensate in the field which could have been expected to be recovered as an adjunct to later cyclical storage operations.

Taylor Group asserts that it is important for the Court to understand retrograde versus non-retrograde gas condensation. ANR does not agree. It is only important that Taylor Group made the same allegations about the value of recoverable gas condensate in both the state and federal lawsuits and that the state court recognized that the physical attributes of the field owned by Taylor Group at the time ANR made its purchase offer (and at the time Taylor Group accepted the offer) were not misrepresented to or hidden from Taylor Group by ANR or anyone else.

B. COURSE OF PROCEEDINGS

The Petition fairly accurately describes the proceedings that occurred in the state and federal trial and appellate courts prior to the state and federal appellate remands to the trial courts in 1996. Taylor Group gives short shrift, however, to the succeeding events at the state court

level. After the case was reinstated, Taylor Group conducted extensive discovery in the state and federal court proceedings.[1] Shortly before the scheduled state court trial, ANR filed another motion for summary disposition. The grounds for the motion included the statute of limitations[2] and Taylor Group's inability to prove that there was reasonable reliance upon any statement of fact made by ANR. On August 22, 1997, the Kalkaska County Circuit Court granted ANR's motion for summary disposition on these and other grounds and rendered an extensive opinion with specific findings and conclusions. The opinion is reproduced in Appendix N to this Brief.

ANR again moved for summary judgment in the federal district court based on the state court's September 16, 1997 dismissal order entered pursuant to the August 22, 1997 bench opinion. The district court granted summary judgment to ANR on May 7, 1998 on the basis of *res judicata*.

Meanwhile, Taylor Group appealed the state court judgment to the Michigan Court of Appeals. After the district court granted summary judgment to ANR, the Michigan Court of Appeals affirmed the state trial court on the basis of the statute of limitations only. The Court of Appeals did not reach the alternate grounds. A copy of the Michigan Court of Appeals decision is reproduced in Appendix O of this Brief. Taylor Group applied for leave to the Michigan Supreme Court, which denied leave.

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[1] Pursuant to the federal district court's R.6, Joint Status Report, p. 4, the parties stipulated to the use of state court discovery in the federal court case.

[2] The alleged misrepresentations were made in 1983 and the suit was not filed in state court until 1993.

The Sixth Circuit concluded that when the state court judgment was affirmed solely on the basis of the statute of limitations, it lost its preclusive effect for purposes of *res judicata* under Michigan law. Accordingly, *res judicata* did not bar Taylor Group's RICO action in federal court. App. A-6, 7.

However, the Sixth Circuit affirmed the district court on the alternative ground of collateral estoppel. The Sixth Circuit determined that the elements of collateral estoppel under Michigan law are (a) the issue in the second action must be the same issue as in the first action; and (b) the issue in the first action must have been essential to the resulting judgment. App. A-8. The Sixth Circuit specifically determined that unlike *res judicata*, a prior judgment on the merits is not an element of collateral estoppel under Michigan law. App. A-8. After a close reading of the Michigan Court of Appeals' opinion, the Sixth Circuit determined that the following issues were actually litigated and necessarily determined by the state trial court and appellate courts in finding that the statute of limitations barred Taylor Group's claim: (1) Taylor Group did not reasonably rely on ANR's alleged fraudulent representations and (2) Taylor Group, through the exercise of reasonable diligence, should have discovered that they had a fraud claim[3] against ANR in June, 1983.

The Sixth Circuit therefore held that as a matter of collateral estoppel (1) Taylor Group cannot show an essential element of their RICO claims – that they reasonably relied on

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[3] The district court held that Taylor Group's state law fraud and RICO claims are based on the same cause of action – defendant's allegedly fraudulent representations to them. App. D-3. This finding has not been appealed.

ANR's alleged fraudulent conduct and (2) the four-year RICO statute of limitation expired by June 1987, four years after Taylor Group, through the exercise of reasonable diligence, should have discovered its cause of action against ANR. Taylor Group filed its RICO claim in federal district court in 1994.

The only aspect of the Sixth Circuit's collateral estoppel ruling challenged by Taylor Group is the holding that a prior judgment on the merits is not a necessary element of collateral estoppel under controlling Michigan law.

These same arguments were presented to the Sixth Circuit in Taylor Group's Petition for Rehearing which was denied by Order dated December 20, 2001.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI DOES NOT SET FORTH ANY COMPELLING REASON FOR GRANTING THE PETITION

A petition for writ of certiorari will be granted only for compelling reasons, the character of which are indicated in U.S. Supreme Court Rule 10(a)-(c). The Sixth Circuit Court of Appeals' affirmance of the district court's grant of summary judgment, applying Michigan collateral estoppel law, does not conflict with a decision of another United States Court of Appeals and does not even decide a federal question, taking its decision outside the purview of Rule 10(a)-(c). Nor did the Sixth Circuit Court of Appeals, in affirming the district judge's denial of Taylor Group's motion to amend, sanction such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's supervisory power under Rule 10(a).

While the reasons listed in Rule 10 do not control or fully measure this Court's discretion, the reason asserted in the Petition for Writ of Certiorari do not even begin to approach the character of the reasons outlined in that Rule.

II. NEITHER THE DISTRICT COURT NOR THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED ANY ERROR

A. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT A JUDGMENT "ON THE MERITS" IS NOT A REQUIRED ELEMENT OF COLLATERAL ESTOPPEL (ISSUE PRECLUSION) UNDER MICHIGAN LAW

The fundamental error that underlies the Taylor Group's argument in support of its petition is an attempt to elevate an imprecisely worded footnote into a change in Michigan law. No authority supports that position or result.

1. *Res Judicata* And Collateral Estoppel Are Different Concepts With Different Elements Under Michigan Law

The courts of the State of Michigan have long and consistently recognized that *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are not the same thing. As recently explained by the Michigan Supreme Court in *Sewell v. Clean Cut Management, Inc.*, 463 Mich. 569, 575; 621 N.W.2d 222 (2001), quoting *Dart v. Dart*, 460 Mich. 573, 586; 597 N.W.2d 82 (1999):

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co. Bd. of Co. Rd. Comm'rs v. Schultz*, 205 Mich. App. 371, 375; 521 N.W.2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies, *id.* at 375-376.

Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not, *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160-163; 294 N.W.2d 165 (1980); *Sprague v. Buhagiar*, 213 Mich. App. 310, 313; 539 N.W.2d 587 (1995)."

In contrast to *res judicata*, the Michigan Supreme Court explained in *People v. Gates*, 434 Mich. 146, 154; 452 N.W.2d 627 (1990) that the doctrine of collateral estoppel "precludes re-litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.[7]"

Footnote 7

[7]"We use the term 'collateral estoppel' to refer to issue preclusion. This Court

generally uses the term 'res judicata' to refer to what is often called 'claims preclusion,' which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action." *Jones v. Chambers*, 353 Mich. 674; 91 N.W.2d 889 (1958).

End Footnote 7

2. *Qualls* Did Not Add An "On The Merits" Element To Collateral Estoppel

About a month after *People v. Gates*, *supra*, was decided, the Michigan Supreme Court issued its decision in the *City of Detroit v. Qualls*, 434 Mich. 340; 454 N.W.2d 374 (1990). In that case, the Michigan Supreme Court opinion included a footnote on the issue of whether collateral estoppel arises from summary judgment as well as from judgment after trial. Taylor Group argues that the Michigan Supreme Court used this footnote to add a third collateral estoppel element to the two elements announced a month earlier in *People v. Gates, supra*. The Michigan Supreme Court's holding does not support Taylor Group's argument.

Part II of the *Qualls* decision starts with the following sentence:

> "While we agree with the dissent that the defendant was not precluded from raising the issue whether the ordinance was valid in 1984, we disagree with the basis for the dissent's conclusion, that is, that a ruling made on a summary disposition motion[27] in a forfeiture proceeding, by its very nature, cannot have a

binding effect. There is no support for the application in this case of the proposition that the nature of the prior proceeding prevents application of estoppel in the subsequent suit." (Footnotes 28 and 29 omitted)

Footnote 27

[27]A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on re-litigation, even if the action has been resolved by a summary disposition, *see e.g.*, *Detroit v. Nortown Theatre, Inc.*, 116 Mich. App. 386; 323 N.W.2d 411 (1982). In fact, "[it] would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. . . . Indeed, a more positive adjudication is hard to imagine." Thus, it is not surprising that the dissent fails to cite any legal authority whatsoever to support this strange contention, and we believe the Court should continue to recognize that, for purposes of collateral estoppel, a ruling rendered on a summary judgment motion will be considered a final disposition on the merits.

End Footnote 27

In this context, responding to a particular point made in the dissent, the Michigan Supreme Court majority opinion in *Qualls* continues by reaffirming the long-established requirements for collateral estoppel as follows:

"Appropriate resolution of the collateral estoppel question turns not on whether the inquiring court characterizes the first proceeding as summary, but rather upon a finding that in the prior proceeding the issue of fact or law was actually litigated and actually determined by a valid and final judgment, and that the determination was essential to the final judgment.[30] 1 Restatement Judgments, 2d § 27, p. 250. Among the requirements courts have set out in order that collateral estoppel may apply are the following:

> The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. [1B Moore, Federal Practice, ¶ 0.443[1], p. 759.]"

Footnote 30

[30]It is a flexible judge-made rule generally said to have three purposes: To 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication,' *Allen v.*

McCurry, 449 U.S. 90, 94; 101 S. Ct. 411; 66 L. Ed. 2d 308 (1980).

End Footnote 30

A contextual reading of the *Qualls* majority opinion reveals that the elements necessary to establish collateral estoppel were not changed by the Michigan Supreme Court in footnote 27 of that decision. Rather, the case stands for the proposition that an issue may have been raised, litigated and actually adjudged in an action decided by motion, thus warranting collateral estoppel effect. The fact that a decision on motion is "on the merits" is no more than one way of determining whether or not an issue was so involved in the decision.

3. No Other Precedential Michigan Authority Adds An "On The Merits" Requirement

Numerous recent published decisions by the Michigan Court of Appeals have cited *Qualls* and have repeated the elements of the doctrine of collateral estoppel listed in *Qualls* without adding a new requirement that the decision also be "on the merits." Most recently, *Dearborn Heights School District v. Adis,* 233 Mich. App. 120, 125; 592 N.W.2d 408 (1998), held that "the doctrine of collateral estoppel precludes re-litigation of a issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding" citing *People v. Gates, supra*, as well as *Qualls*. *Bullock v. Huster*, 209 Mich. App. 551, 556; 532 N.W.2d 202 (1995), vacated on other grounds 451 Mich. 884; 549

N.W.2d 573 (1996), cited *Qualls* among other cases, and held:

> "[c]ollateral estoppel precludes re-litigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceedings. . . . The ultimate issue in the second action must be the same as that in the first. . . . The issue must have been necessarily determined - that is, essential to the resulting judgment - in the first action. . . . It must also have been actually litigated - that is, put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact. . . . The parties must have had a full and fair opportunity to litigate the issue in the first action." [Citations omitted]

See also Radtke v. Miller Canfield, Paddock & Stone, 209 Mich. App. 606, 621; 532 N.W.2d 547 (1995) rev'd on other grounds 453 Mich. 413; 551 N.W.2d 698 (1996) and *Eaton Road Commissioners v. Schultz*, 205 Mich. App. 371, 376-377; 521 N.W.2d 847 (1994).[4]

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[4] In addition to the published opinions cited above, all citing the *Qualls* decision and none adding an "on the merits" requirements for collateral estoppel, numerous unpublished decisions citing *Qualls* have been issued, none of which add an additional "on the merits" element of collateral estoppel as Taylor Group asserts. Among those decisions are: *Tran v. Wayne State University*, Docket No. 208892, decided October 5, 1999; *Haener v. West*, Docket No. 203474, decided May 19, 1998; *Bancorp*

4. The Unpublished *Crumm* Decision Did Not Change The Established Law of Collateral Estoppel

Taylor Group cites the unpublished Michigan Court of Appeals decision in *Crumm v. Addison Community Hospital*, Docket No. 210980, decided December 17, 1999 to support its argument. *Crumm* did not effect a change in Michigan law.

Unpublished decisions of the Michigan Court of Appeals do not have precedential effect under the rules of *stare decisis*. Mich. Ct. R. 7.215(C)(1). *See also City of Detroit v. Qualls*, 434 Mich. 340, 360 fn 35; 454 N.W.2d 374 (1990); *Watson v. Michigan Lottery*, 224 Mich. App. 639, 648; 569 N.W.2d 878 (1997); *Scott v. Skotzke*, 216

Group, Inc v. Meister, Docket No. 174566, decided January 20, 1998; *Odd Christian Reme v. Jaques*, Docket No. 192257, decided September 2, 1997; *Reinhardt v. Rolling Green Corporation*, Docket No. 188499, decided August 1, 1997; *Lantis v. Hankinson*, Docket No. 187535, decided March 14, 1997; *Purdy v. Newland*, Docket No. 190310, decided February 4, 1997; *S. G. Cemetery Association, Inc. v. John Carlo*, Docket No. 128450, decided February 4, 1997; *New Genesis Missionary Baptist Church v. Presbytery of Detroit*, Docket No. 184650, decided December 6, 1996; *Centra, Inc. v. Jaffe, Raitt, Heuer & Weiss, P.C.*, Docket No. 181803, decided September 6, 1996; *Cummings v. Peisner*, Docket No. 181539, decided August 9, 1996; *Marazon v Monroe County*, Docket No. 182131, decided July 9, 1996. In addition to being available on Lexis, copies of these decisions are available at the Michigan Court of Appeals website www.courtofappeals.mijud.net. In the left hand column, click on "Court Opinions" in the "Resource Center" category. Opinions may be searched by text, segment or docket number.

Mich. App. 247, 251; 548 N.W.2d 695 (1996). If the panel had meant to render an important decision, recognizing a change in the law, it would have directed the opinion be published under Mich. Ct. R. 7.215(B)(3) because it "alters or modifies an existing rule of law."

The language in the *Crumm* decision reflects that the court was not being careful in distinguishing between *res judicata* and collateral estoppel in writing its opinion. The second and third paragraphs of the opinion describe the issue as being whether the trial court erred in dismissing the case on the basis of *res judicata*. It related the well-established elements of *res judicata*, including the need for an "on the merits" decision. The court then noted that there was a question about whether there was even a judgment which could be given *res judicata* effect. The court wrote:

> "[s]imilarly, while the parties appear to agree that a settlement was reached in *Crumm I*, the content and scope of that settlement agreement is not in the record presented to this Court. Accordingly, we are unable to determine whether the alleged settlement could be construed as barring plaintiff's claims against the *Crumm III* defendants."

The court went on to determine that the plaintiff was not collaterally estopped from bringing a medical malpractice action against the *Crumm III* defendants without stating whether either party had raised collateral estoppel as an issue. After repeating the long-established elements of collateral estoppel, the court, citing *Qualls*, wrote "because collateral estoppel requires that the issues have been actually determined, judgment on the merits must have been rendered in the first action to preclude re-litigation of the issues in the

second action." This is the only citation to *Qualls* that so provides and the statement is not a holding. The facts in *Crumm* reveal that no judgment at all was entered and that nothing was actually litigated and necessarily decided in *Crumm* – the Court of Appeals was not even sure that the case was settled. Since the historically recognized elements of collateral estoppel were not met, whether a new element would also be required could be nothing more than dicta.

The other case cited in the unpublished *Crumm* opinion is *Latimore v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 640; 386 N.W.2d 618 (1986). That case does not contain an "on the merits" requirement for collateral estoppel. Rather, *Latimore* cites *Malesev v. Garavaglia*, 12 Mich. App. 282, 285; 162 N.W.2d 844 (1968) for the proposition that "a judgment must be rendered on the merits before it may constitute a bar to any subsequent claim." *Malesev* is a *res judicata* (claim preclusion) case and an "on the merits" decision is required for the broader preclusive effect of *res judicata*.

Under Michigan law, claims that were or could have been raised (without regard to whether they were necessarily litigated or actually decided) are barred if the requisites of *res judicata* are met. Collateral estoppel more narrowly bars the re-litigation of issues which must have been necessarily litigated and actually decided if its different elements are established. Nothing in *Crumm* or *Qualls* suggests a merger of the two different doctrines. There is no reason to give the rather sloppy analysis in *Crumm* a precedential effect when even the judges who signed the opinion decided that it should not be published.

The Sixth Circuit applied the correct rules of Michigan collateral estoppel law when it affirmed the trial court on this

ground. Review by this Court is not needed and the Petition should be denied.

B. THE SIXTH CIRCUIT HAD MORE THAN AMPLE BASIS TO AFFIRM THE DISTRICT COURT'S DECISION NOT TO ALLOW PLAINTIFFS TO FILE ANOTHER AMENDED COMPLAINT

Taylor Group concedes that the decision whether to allow a Third Amended Complaint (which actually would have been the fourth complaint filed in the federal court case) is commended to the trial court's discretion. Under all the circumstances of this case, the Sixth Circuit properly recognized that the decision to deny leave was a valid exercise of that discretion. There is no unsettled rule of law or procedure, no issue of public importance and no other reason that Court should grant the Petition to review that decision.

As a preliminary matter, this Court should recognize that only the decision with regard to the second filed proposed Third Amended Complaint (dated June 9, 1997, docket number 88) was properly before the Sixth Circuit and eligible for review by this Court. In September, 1995, Taylor Group voluntarily dismissed all defendants except for ANR named in the First Amended Complaint it was permitted to file. This was done for tactical reasons so that Taylor Group could have an immediate appeal of right to the Sixth Circuit Court of Appeals from Judge Gibson's original dismissal of its case on the basis of *res judicata*.[5] Thus, the consequences of

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[5] While that appeal was pending, the Michigan Supreme Court reversed the trial court's decision and reinstated the state court action against Defendant ANR. There is no argument that the

dismissing the First Amended Complaint were voluntarily assumed solely by Taylor Group.

The decision to strike the Second Amended Complaint (which had been filed without leave of the court, in contravention of Fed. R. Civ. P. 15(a)) and to deny leave to file the first Third Amended Complaint cannot be heard by this Court either. The magistrate judge's decision to strike the Second Amended Complaint (R.79 Order, dated April 11, 1997) was not appealed to the district judge. Taylor Group's First Motion for Leave to File a Third Amended Complaint was filed April 30, 1997. (R.80) It was denied by the magistrate judge by Order entered on July 2, 1997 (R.99 Order) after a hearing held May 27, 1997. This decision was not appealed to the district judge. None of the magistrate judge's unappealed decisions were directly reviewable by the appellate court, so they are not preserved for potential review by this Court. *See Mickler v. Nimishillen and Tuscarawas Ry. Co.*, 13 F.3d 184, 189 (6th Cir. 1993), *cert. denied* 511 U.S. 1084; 114 S. Ct. 1835; 128 L. Ed. 2d 463 (1994) and *Colburn v. Bunge Towing*, 883 F.2d 372 (5th Cir. 1989) applying this prohibition to a motion for leave to amend.

Taylor Group's second proposed Third Amended Complaint accompanied a motion filed shortly after the magistrate judge denied the earlier motion, on June 9, 1997. (R.88 Motion to Amend Complaint) It is the timing and substance of the proposed Third Amended Complaint, alone, that was the subject of the district court's decision and is the

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appeal of the state court decision would have or should have had any effect on continued prosecution of this case against defendants other than ANR, had Taylor Group not chosen to voluntarily dismiss those claims in 1995.

only subject on appeal, were the Petition for Writ of Certiorari to be granted.

The decision whether to grant a motion to amend rests within the sound discretion of the trial court. *FMB v. VanRhee*, 681 F. Supp. 1264 (W.D. Mich. 1987). The governing rule is clear and of long standing – a motion to amend complaint should ordinarily be denied where there is undue delay, **or** bad faith **or** dilatory motive on the part of the movant, **or** repeated failure to cure deficiencies by amendment previously allowed, **or** undue prejudice to the opposing party created by allowance of the amendment, **or** futility of the amendment. *Foman v. Davis*, 371 U.S. 178; 83 S. Ct. 227; 9 L. Ed. 2d 222 (1962) (emphasis added).

As to the allegations against ANR, the magistrate judge determined and Taylor Group agreed that the proposed Third Amended Complaint did not differ substantially from the First Amended Complaint, which Taylor Group voluntarily dismissed. (R.116 Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, p. 27) By virtue of having filed the substantially similar First Amended Complaint months before its motion to amend, Taylor Group concedes delay and cannot now claim it was unable to seek the amendment requested in the Third Amended Complaint at any earlier time. Even in its Petition to this Court, Taylor Group does not offer any reason why amendment could not have been sought sooner.

Taylor Group's bad faith and/or dilatory motive was fully explained to the trial court. (R.91 ANR's Brief in Opposition to Plaintiffs' Motion to Amend Complaint, p. 4-6) In an effort to minimize the costs of this federal proceeding, the parties stipulated to using state court discovery in this case. (R.6 Joint Status Report, p. 4) As noted in ANR's

brief, "Extensive discovery has occurred in the parallel state court proceeding, including 23 lengthy depositions, 10 sets of interrogatories by Plaintiffs and 12 sets of requests for production by Plaintiffs in response to which ANR has copied over 8,000 pages for Plaintiffs." As ANR pointed out, while this state court discovery can be used in the federal action between Taylor Group and itself, "the new parties will understandably seek to repeat all such discovery, since they have not participated in the state court discovery." The magistrate judge agreed. (R.116 Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, p. 31)

The magistrate judge was also fully aware that the delay was prejudicial to ANR (and the other defendants who were sought to have been added) because a material witness, S. Harold Stocker, a previously dismissed RICO "person" defendant (R.50 First Amended Complaint, ¶ 53) and the author of one of the alleged mail frauds (R.50 First Amended Complaint, ¶ 62f and Exhibit N thereto), had died during the pendency of the proceedings. (R.84 Brief in Support of Amoco's Response to Plaintiffs' Motion for Leave to be Allowed to File Third Amended Complaint, p. 4)

ANR also argued at the trial court level that Taylor Group seemed intent upon protracted, expensive and time consuming litigation in this case – perhaps in an effort to coerce settlement. The magistrate judge inquired of counsel for Taylor Group, who offered no excuse for splitting its claims arising out of the same facts or occurrences. (R.116, Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, pp. 17-19) Taylor Group could have brought its RICO claim in the state court proceeding, but chose not to do so. Even when Taylor Group did seek leave to file an amended complaint in the state court action, it did not seek to add the RICO claim. (R.116, Transcript of Hearing regarding

Plaintiffs' Motion to Amend Complaint, p. 19, lines 1-4) Thus, Taylor Group clearly wanted a second bite at the apple, before a second tribunal, to decide its single claim. This second bite was properly denied.

Taylor Group's Motion for Leave to Amend was originally denied by the magistrate judge. (R.102 Order) This decision was affirmed by the district judge after consideration of the same arguments that Taylor Group raised at the Sixth Circuit level and that it included in its Petition to this Court. (R.105 Memorandum Opinion and Order) As the district judge noted, the magistrate judge correctly considered the prejudice to ANR that was a consequence of Taylor Group's undue delay and did not deny the motion on the basis of delay alone. (R.105 Memorandum Opinion and Order, p. 2) The magistrate judge correctly considered the general rule of liberal pleading amendment and the required duplicative discovery, as well as the importance of this matter to Taylor Group. *Id.* This is not a situation, as in *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), the only case discussed by Taylor Group, where there was delay without prejudice.

Both the magistrate judge and the district judge fully considered all of the relevant factors under the correct rule of law and exercised their discretion in a permissible manner. That decision was properly affirmed by the Sixth Circuit and need not be reviewed again by this Court. As stated in U.S. Supreme Court Rule 10, a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

For the reasons stated herein, ANR Storage Company respectfully requests that the Court deny the Taylor Group's Petition for a Writ of Certiorari. The Sixth Circuit ruled correctly and the issues raised in this case do not warrant this Court's attention.

Respectfully submitted,

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Dated April 26, 2002

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:94-CV-600

[Filed June 2, 1995]

THE TAYLOR GROUP et al.,)
Plaintiffs,)
)
v.)
)
ANR STORAGE COMPANY,)
a Michigan Corporation,)
Defendant.)
)

JUDGES:
BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

OPINION BY:
BENJAMIN F. GIBSON

OPINION

Defendant renews its dispositive motion based on prior adjudication. The Court incorporates by reference its Opinion

of January 31, 1995, in which it denied, without prejudice to renew, defendant's motion for summary judgment based on prior adjudication.

In that opinion, the Court found, based on the then current state of discovery and briefing, that claim preclusion did not bar plaintiffs' action because it appeared that an issue of material fact existed "as to whether plaintiffs could have presented their RICO claim in the state action." Opinion at 7. Plaintiffs had argued that they only learned of the necessary elements for their RICO claim during discovery in the state case and that the state trial court would not allow them to amend their pleadings to assert it. Upon defendant's further briefing, it now appears that no genuine issue of material fact exists as to these issues and that defendant is entitled to summary judgment in its favor.

A.

Under Michigan law, *res judicata* or claim preclusion prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding. *Katt v. Dykhouse,* 983 F.2d 690, 693 (6th Cir. 1992); *Eliason Corp. v. Bureau of Safety & Regulation of Michigan Dep't of Labor*, 564 F. Supp. 1298 (W.D. Mich. 1983); *Gose v. Monroe Auto Equipment Co.,* 409 Mich. 147, 294 N.W.2d 165 (1980); *Carter v. Southeastern Michigan Transp. Authority,* 135 Mich. App. 261, 351 N.W.2d 920, 921 (1984). Claim preclusion requires that: (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits. *In re Pardee*, 190 Mich. App. 243, 248, 475 N.W.2d 870, 873 (1991). A prior state court

adjudication has the same effect in federal court as it would in state court. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984).

In *Tafflin v. Levitt*, 493 U.S. 455, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990), the Supreme Court held that state courts have concurrent jurisdiction over civil claims under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*

B.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

C.

Based upon defendant's further briefing and identification of supporting documentary evidence, it now appears that all the elements of claim preclusion are satisfied and plaintiffs' RICO action is barred. Certain issues now appear incontrovertible. Plaintiffs' RICO claim arises in part out of the same cause of action as their state law fraud claim.[1] Also, the parties in this action and the state court action are the same or at least in privity. Further, the state court judgment was with prejudice and on the merits.

Several other matters no longer present genuine issues of material fact. Previously, the Court had recognized a

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[1] Plaintiffs assert that this Court held that a genuine issue of material fact exists as to whether plaintiffs' state law fraud and RICO claims arise from the same occurrence or transaction. This Court actually stated that:

> Although plaintiffs' RICO claim arises in part from the same misrepresentations of defendant as alleged in plaintiffs' state court action, plaintiffs contend that they were unable to bring their RICO claim because they learned necessary elements only during discovery in the state case and the trial court did not allow them to amend their pleadings to assert it.

Opinion at 6. Although plaintiffs' RICO claim includes allegations of defendant's fraudulent representations to other mineral interest owners, as to plaintiffs, both their state law fraud and RICO claims are based on the same cause of action -- defendant's allegedly fraudulent representations to them.

genuine issue as to whether plaintiffs could have presented their RICO claim in state court. Opinion at 7. It is now clear that plaintiffs knew of the factual basis for their current RICO claim and had used it to respond to a dispositive motion in the state court action. In state court, plaintiffs argued that:

> It is now obvious from defendant's prior conduct in acquiring mineral interests in other gas storage projects that it knew full well that it had substantially underpaid plaintiffs and was now trying to relieve itself of its own fraud.

Brief in Support of Plaintiffs' Response to Defendant's Motion for Summary Disposition, at 15-16 (Exhibit B to ANR Storage Company's Reply to Plaintiffs' Response to ANR's Renewed Motion for Summary Judgment). Plaintiffs also detailed the disparity between defendant's representation to the sellers of the amount of remaining recoverable gas condensate and the amount actually produced. *Id.* at 16-17. This is the same information that plaintiffs now use as the factual predicate to establish the pattern of racketeering activity required for their RICO claim.

Also, it is now clear that plaintiffs had time to amend their complaint to raise this issue, had they chosen to do so. Plaintiffs have stated, in briefing to this Court, that their "RICO claim against ANR Storage Company accrued in May of 1993 at which time Plaintiffs discovered the pattern of racketeering activity and a similar scheme in regards to other storage fields." Brief in Support of Plaintiffs' Response to Defendant ANR Storage Company's Motion to Dismiss and/or Summary Judgment, at 16. However, the state court

did not dismiss plaintiffs' complaint until February 7, 1994. Further, as plaintiffs state in their brief on appeal in the state court action, in "response to Defendant's motion and brief for summary disposition Plaintiffs requested that they be allowed to amend their complaint." (Plaintiff-Appellant's Brief on Appeal at 37, Exhibit A to ANR Storage Company's Reply to Plaintiffs' Response to ANR's Renewed Motion for Summary Judgment.) There is no genuine issue of material fact that during the period from May 1993, when their RICO claim accrued, to February 7, 1994, when their state law fraud claim was dismissed, plaintiffs had time in which to move to amend their complaint and add a RICO claim. However, plaintiffs simply did not do so.

Plaintiffs further contend that they were unable to amend their complaint to plead a RICO action in the state court because it would have been futile. They assert that they were procedurally prevented from filing a RICO claim because of the Michigan Supreme Court's "tender back" rule in *Stefanac v. Cranbrook Educational Community*, 435 Mich. 155, 458 N.W.2d 56 (1990), which was the basis for the dismissal of their state law fraud claim. Plaintiffs' claim that a motion to amend their complaint to add a RICO claim would have been futile is not persuasive. As noted above, state courts have jurisdiction over civil RICO claims. *Tafflin*, 493 U.S. 455. Whether the state court would have applied the tender back rule of *Stefanac* to their RICO claim was never determined. Plaintiffs could have moved to add a RICO and argued that the state law tender rule does not bar a federal statutory RICO claim. Whether the tender rule applied then would have been determined, after any appeals, for purposes of issue preclusion. However, plaintiffs simply did not litigate their RICO claim, even though they could have.

D.

For purposes of claim preclusion, the Court finds that there is no genuine issue of material fact that: plaintiffs' cause of action in both the state and this federal case are the same; the parties or their privies are the same; the prior judgment was on the merits; and plaintiffs could have litigated their RICO claim in the prior state court action. Accordingly, the Court will grant defendant's motion for summary judgment.

/s/ _____
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: June 2, 1995

APPENDIX N

STATE OF MICHIGAN

IN THE 46TH CIRCUIT COURT FOR THE COUNTY OF KALKASKA

Case No. 93-4776-NZ (M)

THE TAYLOR GROUP, et al,
Plaintiffs,

vs

ANR STORAGE COMPANY,
Defendant.

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE DENNIS F. MURPHY, CIRCUIT COURT JUDGE

Grayling, Michigan - Friday, August 22, 1997

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this time. Thank you.

MR. DEVRIES: Thank you. Your Honor.
(court recessed at 11:39 a.m. and reconvened at 11:44 a.m.)

THE COURT: All right. In this matter the Defendants have filed a Motion for Summary Disposition alleging several grounds in support of why that motion should be granted, and also there has been filed a Motion to Dismiss based upon the statute of limitations, a (C)(7) motion.

Concerning the (C)(10) motion, the standard of law to be applied to that motion, which the Court is obligated to follow, is to determine whether there is factual support for the claim and giving the benefit of the reasonable doubt to the non-moving party resolving all factual matters in the plaintiff's favor. Whether there is a sufficient record to

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support the claim, and here we have a common law fraud claim, a misrepresentation claim, and more specifically it falls into that narrow category of cases concerning fraud by a seller in connection with the -

MR. ZIRNHELT: Fraud by purchaser, Your Honor?

THE COURT: -- fraud by purchaser in connection with the sale of mineral rights here in this case. As I mentioned in the prior opinion and order entered in this

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matter concerning a motion for a protective order, it is important to keep in mind that this is in that narrow category, again, of fraud being alleged on the part of purchasers in relation to their purchase of mineral rights from the Plaintiffs in 1983; and further it is necessary to examine the elements of that common law fraud claim in connection with the unusual circumstances where fraud is alleged -- or at least less common circumstances where fraud is alleged on the part of the purchaser, not the seller. That's the standard to be applied, and it is unfortunate that we couldn't have addressed this motion sooner as I would have preferred to have prepared a written opinion along the same lines that were completed in -- in this case back in March concerning the protective order. I always prefer a written opinion and order because it gives the Court more time to clearly and more succinctly state the basis for its ruling. However, here we do have a trial scheduled next week, so if a little bit of this ruling appears unconnected it's only because we don't have the benefit of being able to write and make revised drafts.

The question, then, boils down under that directed verdict standard, whether there is genuine issue of disputed fact concerning those specific elements of this claim, that of common law fraud, and more narrowly fraud

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where it's alleged on the part of the purchaser of, in this case, of real property interests. It is a strict standard and the Court does not lightly grant summary disposition, but it is required to do so under the rules where there simply are no facts in dispute which could support the claim. In other words, it would be -- it would be inappropriate to send a case to a jury where there are simply no jury questions of fact concerning the claim, and here we have a count of common law fraud, and the facts preceding this motion, I believe, are set out very clearly in the Supreme Court's prior opinion, number one. In addition, number two, additional facts are referenced in the Court's March, '97 opinion. I incorporate each of those opinions, the Supreme Court's opinion and this Court's opinion, into this ruling. In addition, I have reviewed voluminous materials here, all of them, and they include the affidavits, exhibits, excerpts of depositions and other attachments such as deposition exhibits. I will reference additional facts where appropriate as I go through the various issues with respect to the motion.

First of all, the -- the first issue is whether in connection with this offer to purchase made by the purchasers, Defendant ANR, for Plaintiffs' mineral rights -- the question is, was there any legal duty on the part

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of Defendant, ANR, the purchasers, again that needs to be emphasized and understood by all parties, that they were contemplating or may in the future have undertaken to use the property that would be conveyed by Plaintiffs' mineral deed

for a gas storage operation which would then enhance the quantity of condensate that they would recover through other than -- through means other than that which had been used to produce minerals up to June of '83 when they decided to sell their mineral rights. I believe the law in Michigan is very clear that there is no duty, was no duty on the part of ANR to disclose that fact that significantly more condensate would be removed if they were to use the reservoir for gas storage operations. I believe that law is very clearly set out in the appellate court cases and supreme court cases, and so that Plaintiffs could not -- cannot, I don't believe, premise a fraud claim upon alleged conduct which we'll accept as true that they withheld that information that there would be a significant amount of condensate extracted beyond what -- what otherwise was represented. That they're under simply no duty to do that in Michigan under Michigan law. I think that's -- and again, it needs to be again stressed that this is a fraud-by-purchaser complaint, and I quote from the *Zaschak* case, z-a-s-c-h-a-k, versus *Traverse Corp*, 123 Mich App 126,

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page 130, and I quote, "Michigan courts have not yet recognized a duty on the part of a vendee", purchaser as we have here which would be Defendant ANR, "... to disclose facts relevant to the value of the real estate in question...", here it would be facts relevant to the value of the mineral rights in question, "...even when specifically asked." We decline to promulgate such a rule -- excuse me, such a duty on the facts of this case. Although Plaintiffs claim that they would not have sold the mineral rights absent Faith's alleged concealment of facts and Faith, of course, was a defendant apparently connected with *Traverse Corp*, which

coincidentally happened to be Mr. Zirnhelt's client back in 1983, but that's not important, absent Faith's alleged concealment of facts the record discloses that plaintiffs received what was then accepted value for the rights, two hundred dollars per acre, but here's an additional and important observation of the Court in connection with their holding. Moreover, rather than obtain an independent appraisal of the property's mineral potential -- exactly what happened here -- plaintiffs relied upon Francisco, with whom they had previously settled, who assured them that two hundred dollars per acre was the going rate for mineral rights. I think that fact was significant to the court because it's part of their ruling. It follows

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their two holdings -- alternative holdings: one concerning whether they plead the case; and the second concerning even if it were plead the court goes on to state that, again on page 130, even though a question of fact could possibly -- possibly could exist on whether defendant Faith misrepresented the value of the mineral rights, which is what the allegation is here, summary judgment was properly granted because under any development of the facts, Faith had no recognized duty to disclose his alleged knowledge of the potential oil and gas activity in the area of plaintiff's land, and the court went on then to rule that, upon that basis, which would be a (C)(10) basis such as we have here, plaintiffs have failed to state a claim upon which relief could be granted, and I believe that's what we have, the same situation here. We have a situation where Plaintiffs, and again it needs to be recognized that Plaintiffs here are not selling a used car, they were not selling a -- a residential home. This was a sale involving mineral

rights which would, in any reasonable -- under any reasonable view of the facts, cause one to obtain an independent appraisal, just as was noted in the *Zaschak* case, particularly where the offer, referring to the letter and attachments to that letter which for the agreement, the mineral deed, the valuation statement,

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Attachment 1, the actual offer to purchase as set out and attached to the letter, states very clearly, quote,

> "In the opinion of buyer, the total of the cash payment, royalty checks to be received and contingent payments, if any, equals or exceeds the market value of the mineral rights which buyer is offering to purchase from seller."

Now that would be a red flag to any purchaser where it states "in the opinion of buyer". That gets to whether the element of a material fact has been presented but it also, I think, bears on the legal duty, and importantly here, unlike the case of *Gar versus Alden* where there was -- again was fraud by the purchaser alleged. There they were -- false statements were made to an infirm and elderly sellers which caused them to forbear or to decide to forego getting an independent appraisal on the value of standing timber on their property. There are no facts plead or alleged in this case that demonstrate in any way that ANR, the Defendant-Purchaser, either obstructed, hindered or suggested that Plaintiffs should not get their own appraisal. We are not dealing, further, with the infirm and elderly plaintiffs. This case involves Plaintiffs who were mineral rights owners for several years, and

furthermore, were mineral rights owners of a sufficient intelligence

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and intellect that triggered them to, at one point earlier, prior to this sale, to get an independent opinion on a prior offer, which they did and it was rejected. They simply didn't do so the second time around. They relied on others opinions that it looked like a good deal, and that's despite the fact that their basis for the amount used to calculate payments is presented to them as an opinion. Again, that's a red flag phraseology to any -- to any seller; to a purchaser, of course, let alone to a seller, which again has a slightly different duty under Michigan common law.

It's not a question of fact whether they should have gotten an outside report. I disagree with that conclusion. The question is whether there was anything done by Defendant to dissuade, hinder, obstruct Plaintiffs from obtaining an independent report, had they chosen to. I have to believe my observations in that regard are, again, supported not only by the appellate court and Michigan Supreme Court but by the observations of the author, Cameron, in his treatise "Michigan Real Property Law, Second Edition", Section 15.49. Again, as I stated, I don't take granting of these motions lightly, but I do feel I have a duty to follow the law and I believe it does require granting of the motion where we have a special category of common law fraud alleged, that

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of fraud by a purchaser, and the law, I believe, in Michigan is very clear on that point. At -- Viewing the facts in a light most favorable to the Plaintiff we have really what could best be alleged as a false opinion. Again, under Michigan law false opinions cannot form the basis of a common law fraud misrepresentation claim, and even if the Attachment 1 figures to the offer, again that's the third page of the -- of the offer package which is composed of the ANR letter which is really a solicitation to The Taylor Group, we're interested in buying, do you want to sell-type of offer, a cover letter, with an attached specific and detailed offer with an evaluation attachment to that, Attachment I or 1 – it's been referred to as both the letter "I" and Roman numeral "I", in these discussions, and attached to that is the mineral deed and other documents not forming the basis of the contract.

It is important to further note that the buyer was offering, ANR, the Defendant-Buyer or Purchaser, was offering to purchase "the mineral rights", not to purchase a fixed amount of gas or condensate, and that Attachment I, I must conclude is more of a schedule of how we're arriving at our figures, but the offer is clearly phrased to be -- clearly stated to be, it's not phrased, it's stated to be an offer to purchase all of

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their mineral rights, and the mineral deed, itself, states that Plaintiffs, when they signed the mineral deed after consulting with others, after reading the offer, and after not obtaining any independent appraisal, they then conveyed "all gas, oil

and other minerals" -- their rights to all gas, oil and other minerals in the Blue Lake 18A field. The Court's ruling would be different if this were a case where ANR was in a joint venture relationship, or special relationship, or that of producer-operator, or any other type of business relationship between the two, but here ANR is an outsider, a third party, they are not the operator of the field and therefore there's no basis in the law to invoke any special exception in this case, and this was done, as I mentioned, in the *Gar* case. Further they -- the Court's opinion would be different if "they" meaning ANR, were to have done anything to obstruct Plaintiffs from obtaining a independent appraisal and there's no evidence of that whatsoever. Further it should be noted that the Court's obligation not to say, well, does this appear to be a fair deal ten years later. Well, perhaps not and I personally believe that it's -- it's unclear whether it was or wasn't at that time a fair deal. I mean, even if it wasn't that's not the -- that's not the standard of review and that's not the question to be asked under the

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law.

It's interesting to further note that a federal district judge was presented with a very similar issue in connection with a motion for summary disposition and there are striking similarities in both the facts and the applicable law, though it's not specifically quoted as a Michigan law. The common law or rules followed by that district judge in connection with the fraud claim are very similar to that found in Michigan. That case is *Keasler v. Natural Gas Pipeline Co.*, 569 F Supp 1180, a 1953 case. It's a district court opinion from the

Eastern District of Texas and in that court's memorandum opinion he discusses a conversion claim, which I'm not going to discuss, but rather turn to the fraud section, and the court discussed the plaintiff's claim. They seek to recover for fraud and misrepresentation under three theories. They discussed federal securities, Texas fraud statute and the common law. While the particular elements of each theory vary somewhat as to proof -- I don't understand that word there -- "vary somewhat approve" it says, but anyway all the particular elements of each theory vary somewhat. The complaint alleges common acts of misrepresentation, and here is how the court summarized the defendant's alleged fraudulent misrepresentations. Not telling plaintiffs about likely

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future events: to-wit -- and this is just like this case -- future prospects for enhanced gas production in depleted fields, the likely production of quote, gas condensate, quote, from the injection and withdrawal of storage gas, just like we have here. The possibility that the field might produce longer than expected. Next, offering lump sum payments to plaintiffs for their interest without having itemized all the crucial facts. Again, this is all a part of the fraud claim. The price paid, the volume of gas in place purchased, the methods used to estimate the minerals remaining in place, the real value of the hydrocarbons, just as we have here, and they allege other fraudulent acts such as stamping the offer " non-negotiable", failing to tell these plaintiffs that they settled or compromised with others, but really focusing on what is alleged to be the misrepresentations they are very similar to exactly what we have here and that is that in years subsequent to '83 after this offer to purchase was accepted, the mineral rights conveyed,

the monies paid, they then -- "they" meaning ANR, the purchaser, then began using the field for a gas storage operation which as an incident or benefit of doing that they were able to extract additional condensate that's not typically extracted from non-gas storage means.

The district court judge in the federal court

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noted, as a general rule fraud consists of either a false representation of a past or present material fact or a false promise to do some future act. The concept of fraud includes acts of nondisclosure to the extent the law requires disclosure, however, it is a fact, not speculation as to the future that must be disclosed. In Michigan I believe we are -- we follow the rule that the fraud must allege to past or present facts. In that regard there's some difference, but the court goes on to note the first set of allegations that *Natural* committed fraud by failing to make predictions about the productive life of the reservoir -- very similar to what we have here, regulatory acts of Congress and federal agencies and the advancement of petroleum engineering is bazaar in the extreme, said the federal judge. Moreover, he states, even had *Natural*, the pipeline company, been prescient or had been able to predict the future it was under no duty to share its prognostications with plaintiffs. Apparently, again as here, the additional hydrocarbons and condensate were extracted beyond what would normally be extracted from non-gas storage cycling operations, and the court granted the summary disposition motion because of the fact that -- the court noted in its finding in denying the motion that plaintiffs complain -- this is a quote,

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> "Plaintiffs complained that *Natural's* offer of a lump sum payment for the gross value of their royalty interests was deceitful because the factors of volume and unit price were not disclosed."

The *Keasler's*, plaintiffs, suggest that had those factors been revealed they would have been aware of the quote, real value, unquote, of the hydrocarbons in place. Again, that's what the plaintiffs are saying here. In other words, *Natural's* offer to pay certain sums for the quote, gross value, unquote, of minerals remaining was fraudulent because the sum offered was, according to the plaintiffs, less than the minerals real value, and the court noted as follows, quote:

> "The court finds no precedent for penalizing one who offers his adversary less than the 'real value' in opening negotiations. Moreover, the hidden premise of plaintiffs' argument that the consideration was inadequate was originally plead but later abandoned as unproven. There is no credible evidence to show that the real value of the rights conveyed to Natural are other than the price paid."

And again, we have to examine this case the Taylor case, just as is true here in the *Natural Pipeline* case, you have to look at the value at the time conveyed and

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not what additional hydrocarbons or value of condensate might be extracted through the use of future gas storage operations. If the law were that a purchaser is under a duty tell the seller -- excuse me, yes, tell the sellers of all of the possible intended uses and benefits that sellers may be giving up in the future, if certain future events occur such as getting a gas storage operation in place, then we'd have a different situation, but that's not the law; and further, concerning the observation of the *Keasler* court at -- okay, here it is -- all right, the *Keasler* court further noted that when the facts are patent or when the plaintiff has equal opportunity for obtaining the information, which is what we have here, that he may be expected to utilize if he cares to do so, or when the defendant has no reason to think that the plaintiff is acting under misapprehension, there is no obligation to give aid to a bargaining antagonist by disclosing what the defendant has himself discerned. To a considerable extent, sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages which lead to no liability. That's essentially what we have here. The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself, and if the plaintiff is indolent, inexperienced

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or ignorant, or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies. This is the rule particularly applied to the purchaser's duty as opposed to a seller. Again, that distinction needs to be emphasized

throughout this ruling and, again, of course I do find -- have found as fact that there was nothing done to deter or dissuade or obstruct Plaintiffs from getting their own separate valuation and they had no duty to say to Plaintiffs, for example, well, you better not accept this offer because we are anticipating a -- pulling together a gas storage operation if the following four events occur, and it may occur in the future and if so your mineral rights may be worth ten times what they are now, but you may get that money five years from now or ten years from now. There's no duty upon Defendant to – to make such statements.

So, for those reasons the Defendant's motion is granted, and further, the Court should stress, too, that we have clearly written, it's in black and white, and it's called by Mr. Zirnhelt the "famous paragraph four" but I don't know that that type of whimsical reference gives it any less weight. It's still written, it's still there, it's still part of the offer and acceptance, it's still part of the contract and purchasers are being told

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directly -- sellers, excuse me, are being told by the purchasers this is our opinion. In Michigan, under Michigan law a fraud claim cannot be predicated upon an opinion. That's what we have here. It's an opinion as to what the value of their mineral rights are, and again, these are owners of mineral rights, which is a special area of the law. It's not difficult or overly complicated, it's simply different in that these are owners, The Taylor Group, are not owners of a used car or a residential home, they are owners of mineral right, who in the past have secured independent opinions from petroleum

experts and didn't do so in this case, and are very upset, understandably, about the appearance of a windfall being reaped by Defendant ANR. But the offer does state in paragraph four,

> "In the opinion of buyer, the total of the cash payment, royalty checks to be received and contingent payments, if any, equals or exceeds the market value of the mineral rights which buyer is offering to purchase from seller."

-- and what is buyer offering to purchase from seller? All of their mineral rights, not part of them. I should say, all of them in a certain formation, of course. I think they did exclude deep well formations, but that's not relevant to this case because here we're

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talking about the mineral rights to the formations that contain the condensate and it clearly says, "in the opinion of buyer". That -- There is no question of fact for the jury on that. It's an opinion. If there was a dispute as to whether that was an opinion or not, it would be a jury issue and the motion should be denied, but here it's clearly an opinion. There must be a material fact. That's an element required upon which a plaintiff can base a claim of fraudulent representation, but there must be a material fact. Here we don't have a material fact. We have an opinion. As noted in the Michigan law, a material fact cannot be an opinion, belief, speculation or prediction. It must relate to something past or present that can be proved or disproved, and the very first part of the jury

instruction on this issue, which I think is an accurate summary of the law, this is the most important phrase, "A material fact cannot be an opinion", and that's exactly what we have here, and far that reason alone, separate and apart from the other bases, the motion must be denied because there simply can be no proof of misrepresentation of a material fact when what was presented to Plaintiffs was an opinion as to the value. That's a separate grounds for granting the motion. Now, the statute of frauds issue, turning to the

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(C)(7) bases for the motion, is again a separate grounds upon which to grant Defendant's motion because there was no concealment of what type of operation was going to be run by ANR in that field. I believe the State of Michigan law now -- and I'm bound to follow that, I cannot make law or change law, I can only apply it -- and we have a situation here where -- where MCL 600.5827, MSA 27A.5827 reads as follows:

> "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in Sections 5829 to 5838..."

-- and parenthetically it's noted that those sections concern various types of actions that do not include common law fraud, such as time periods concerning open account, a different limitation period for time -- right to make entries and recover possession of land, and common carrier actions, etcetera, so continuing on with the quote of the statute, "... and in cases not covered by these sections", which is what we

fall into, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Now, in this regard we're, of course, dealing with a six year statute of limitations period for common law fraud, and since the statute, which is again the

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controlling law in Michigan, provides that the claim accrues at the time the wrong upon which the claim is based was done, which is 1983. Since all the elements of the claim existed or accrued at that time, then this matter is -- was filed four years beyond -- approximately four years beyond the statutory period of six years.

If a discovery basis is used to calculate the statute, which I don't believe is current State of Michigan law, then the question is when did Plaintiffs discover or when would Plaintiffs -- when should Plaintiffs have reasonably discovered the fraud, and in that regard, again, it was no secret that there was contemplated this gas storage operation, if that can be a basis for fraud. Again, you have to take that first, and we have opinion -- essentially opinions rendered and not facts. So, assuming all of the allegations of Plaintiffs claim are true it's important to note that –

(Pause)

-- it's important to note that even prior to June of '83, Plaintiffs were -- at least one of the primary Plaintiffs who could be called a Taylor Group representative, was informed by their own expert in 1980 that as concerns the value -- Petroleum Engineering Report -- let me get the exact title

here, discussion of future production of reserves from the Blue Lake 18A

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field, Kalkaska County, this is an attachment to the -- to Defendant's motion which is offered as an admission of Plaintiffs, in essence --

MR. ZIRNHELT: Your Honor, so the record is clear could you give the party who signed that and the date of it and –

THE COURT: I'm doing that. I'm looking for it right now.

MR. ZIRNHELT: okay, thank you.

THE COURT: Yes, sir. Titled Evaluation of Harold Snyder Interest in AMOCO State Blue Lake Unit "L" Well 317. It's signed by Charles Brown, Petroleum Consultant, August 19, '80, and that's the cover sheet. Attached to it is a letter to Michael Hoey, President, Mineral Management Services, P O Box 792, Traverse City, and it concerns -- is says, Re: An Appraisal of Royalty Interest Owned by Harold Z. Snyder in the AMOCO State-Blue Lake Unit "L" Well, 3-17, Kalkaska County. It's signed by Charles Brown and attached to that, as I said before, is a discussion -- it's titled Discussion of Future Production of Reserves from the Blue Lake 18A, 28 North, 5 West field, Kalkaska County, Michigan. I don't know the tab number on your brief where this was included, Mr. DeVries. Do you know the tab number on that?

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MR. DEVRIES: Tab four, Your Honor.

THE COURT: Tab four, all right. It states right in that report from the petroleum consultant that -- and again, it's common -- it's been established that these various Plaintiffs shared various information amongst themselves, these Taylor Group Plaintiffs, and here's report which states on the last page, after going through the various calculations, and this is underlined by the -- apparently by someone -- and it appears to be as part of the report -- it is important that the royalty owners remember this possibility in giving any future lease for gas storage purposes, and the possibility he's referring to is the following: no consideration was indicated as given to any cumulative condensate production in balance to date for each well, paren, or for the entire reservoir, paren, or the effect that change in the gas allowable production scheme might have on the future condensate to be recovered from each well, paren, or the entire reservoir, close paren. It is anticipated that the operator, paren, AMOCO, close paren, may not be too concerned about low condensate recovery during the gas production phase of the reservoir, comma, but may be expected to retain its rights to any liquid recovered from possible use of the reservoir as a gas storage field in the future, period. That's allowed by: It is

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important that the royalty owners remember this possibility in giving any future lease for gas storage purposes. That was in 1980, again, knowledge Plaintiffs had as to that possibility

and the fact that that significantly -- could significantly alter the value of the rights which they held.

Now, the question, when they reasonably should have discovered the alleged fraud? If you take the fraud alleged as true, and again we cycle right back and that's why I have a difficulty with this statute of limitations point, it's gets right back to the point this is alleged fraud based on an opinion, and therefore, there is no common law fraud, and further, as I mentioned before, it's fraud upon the part of a purchaser and, as I mentioned before, there was no duty for the purchaser to disclose every bit of knowledge concerning the potential value of that condensate in the future to the sellers, but accepting all that as true, could they have discovered that alleged fraud? Apparently it's -- it appears to the Court very clear that this existence of additional condensate being extracted by future gas storage operations was something that could have been discovered easily through the exercise of any type of reasonable or due diligence. That being the case, even applying the discovery rule, Plaintiffs claim -- the

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complaint, I should say, has been filed too late. Even applying the discovery rule and not the statutory cause of action accruable.

MR. ZIRNHELT: Your Honor, could I make an inquiry? Does that ruling only apply to the parties who had access to that particular document?

THE COURT: Well, no, no, because it's very clear from the record here in viewing the affidavits, exhibits, and

so forth, that the production from that and other – as been mentioned, other wells, is a matter of public record. They are filed with the State, those figures, and they could have discovered it very early on through the exercise of due diligence and that would apply to all Plaintiffs, and I find that they -- the rules is the same regardless of which Plaintiff you were talking about.

MR. ZIRNHELT: I was talking about that report, Your Honor. I'm just trying to get a sense of what the -- what the impact of that report was in your ruling.

THE COURT: Well, the impact of the report, I should clarify, is really minor. It's just another factor showing that in 1980 there was some knowledge -- or the use of a report, and some knowledge of -- that there's an issue concerning use of their properties for gas storage operations. In other words, Plaintiff, Taylor Group, was not ignorant, at least not even in

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1980, of the possible additional condensate value if there is a gas storage operation put into that property in the future.

MR. ZIRNHELT: Your Honor, that's why I raised the issue. That's The Snyder Group who had the access to that particular memo, not The Taylor Group. That's why I raised that issue.

THE COURT: All right, but I -- It's been pretty clearly set out in this litigation by way of -- of the complaint, depositions, affidavits, etcetera, that these groups freely shared their information, and that fact is why we have a claim

by all the Plaintiffs that they were defrauded because other -- the original fraud information apparently was relayed to the other Plaintiffs.

All right, let me continue on. The Michigan Supreme Court has not yet applied the discovery rule to common law fraud actions but if it is applied, again it appears that the statute of limitations would still bar the complaint. That's again -- that's a separate bases to grant the motion independent from the (C)(10) grounds.

As to whether the court rule would require that this case be dismissed -- well, as to whether the court rule would require that the Court dismiss this matter because there is a substantially similar claim pending against the same Defendants in federal court, I'll

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reserve ruling on that. There's no clear direction in the case law on that and I don't know that it's even necessary for me to give a third bases to grant the motion. I would note that 2.116(C)(6) reads as follows: The motion, and again of course referring to a summary disposition motion -- I'm reading (C), grounds -- the motion may be based on one or more of these grounds. It must specify the grounds on which it is based. Number six, another action has been initiated between the same parties involving the same claim. Well, at this juncture it should be noted that there is a RICO complaint filed in the, I believe it was the Western District of Michigan, I don't have a copy of it in front of me, and that -- that complaint I believe came after this. Is that correct, counsel?

MR. ZIRNHELT: That's correct, Your Honor.

THE: COURT: Do you agree with that?

MR, DEVRIES: I do, Your Honor.

THE COURT: The federal claim was filed after this state suit?

MR. DEVRIES: Correct.

THE COURT: Ali right. The rule reads, another action has been initiated between the same parties involving the same claim. All right, well, I'm not going to rule on that. I don't think it's necessary. We'll

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leave that issue unresolved.

THE COURT: All right. All right, you can prepare an order?

MR. DEVRIES: I will prepare an order, Your Honor.

MR. ZIRNHELT: Could I have a couple clarifications, please, for the record?

THE COURT: Well, I need to take a break at this time.

MR. ZIRNHELT: Okay.

THE COURT: Thank you.

MR. ZIRNHELT: You'll be back, Your Honor?

THE COURT: Well, let's go off the record and you can ask what you want. Why don't you come back here.

MR. ZIRNHELT: Okay.

(Proceedings concluded at 12:46 p.m.)

APPENDIX O

STATE OF MICHIGAN

COURT OF APPEALS

No. 206534
Kalkaska Circuit Court
LC No. 96-004776 NZ

Unpublished July 13, 1999

The Taylor Group, an Indiana Generala)
Partnership, Charles K. Newman, Stephen R.)
Newman, Marilyn Dodds, Christine Newman)
Aumiller. Irma Newman, Keith Dempsey,)
Carolyn M. Dempsey, Roland J.W. Linder,)
Estate of Ruth Dempsey, Deceased, Narlyn D.)
(Dempsey) Vinyard, Basil Dempsey, Bryna M.)
Dye, Winifred Y. Blossom, Ray Bullock, Kris A.)
Bullock, Jeanne L. Bullock, Jack L. White,)
William J. White, Carol Janeharshman, Dee Ann)
Peterson, Ken A. Stoops, Sheryl L. White,)
Robert L. & Betty J. Stoops Charitable Remainder)
Unitrust, Christine M.(Neideck) Weiss, Steven P.)
Neideck, Robert R. Neideck, Jr. Margaret C.)
Neideck, Robert R. Neideck, Lawrence N.&)
Marie E. Williamson, Estate of Virgil Burkholder,)
Deceased, Alison M. Burkholder, Carolyn Rose)
Burkholder, Joleen M. (Burkholder) Hurt)
Tim Burkholder, Estate of John Ayers, Deceased)

John S. Burd & Patricia A. Burd, Jim Mathis, Paul Nussbuam, Kurt Evan Bullock, Elmer Nussbaum, Jeffrey Dempsey, Erica L. (Dye) Dyeson, Harold and Ellen Snyder, James A. Snyder, Marian S. (Snyder) Willey, The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Spring Arbor College); The Harold & Ellen Synder Charitable Remainder Unitrust (Trustee-Free Methodist Foundation), Ruth E. White, Clarence A. Synder, and Arthur H. Snyder,

Plaintiffs-Appellants,

vs.

ANR STORAGE COMPANY,

Defendant-Appellee,

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's decision to grant summary disposition in favor of defendant. We affirm.

The trial court granted summary disposition in favor of defendant on several alternative grounds; however, because the trial court correctly decided that plaintiffs' complaint was barred by the applicable statute of limitations, our review of plaintiffs' other issues is unnecessary.

In March 1983, plaintiffs, a group of individuals associated with Taylor University in Indiana, were contact by defendant regarding the purchase of plaintiffs' mineral rights. Defendant is engaged in the business of storing natural gas. Defendant informed plaintiffs that it was interested in purchasing each plaintiff's pro-rata share of mineral rights in Blue Lake 18A Field, a tract of land in Kalkaska County, for the purpose of developing a natural gas storage facility. At that time, Amoco Production Company was operating Blue Lake 18A Field, and plaintiffs were receiving royalties from Amoco in exchange for drilling rights. The field was producing both natural gas and natural gas condensate, a valuable liquefied form of natural gas.

Following negotiations, plaintiffs agreed to sell their mineral rights to defendant for a price calculated by using defendant's estimate of the remaining value of those rights. Specifically, in exchange for the mineral rights, defendant agreed to pay plaintiffs a sum based on the remaining gas in the field as of June 1, 1983. In the early 1990s, plaintiffs came to believe that they had been defrauded by defendant with respect to defendant's representation regarding the volume of natural gas condensate remaining in Blue Lake 18A Field in June 1, 1983. On January 14, 1993, plaintiffs filed this suit, alleging that defendant had been "either intentionally false and incorrect, or negligently false and incorrect" in representing the volume of natural gas condensate remaining in the ground in June 1983. In its answer to plaintiffs' complaint, defendant offered the affirmative defense that each plaintiff had accepted a cash payment in exchange for the execution of a release of all obligations arising out of the representation made by defendant in connection with the sale. Defendant later moved for summary disposition on the basis

of the release. The lower court granted the motion, and this Court affirmed the decision of the lower court in *Taylor Groula et al v ANR Storage Co,* unpublished opinion per curiam of this Court, issued March 27, 1995 (Docket No. 173259). Our Supreme Court however, reversed this Court's decision in *Taylor Group v Storage Co*, 452 Mich 561; 550 NW2d 258 (1996), and remanded the case to the trial court for further proceedings. On remand, the trial court again dismissed plaintiffs' case. Plaintiffs now appeal from that dismissal.

Plaintiffs argue that the trial court erred in dismissing their case on statute of limitations grounds because there were genuine issues of material fact with regard to whether they knew or should have known that they had a cause of action for common law fraud against defendant six years before they filed their complaint.

The parties agree that the applicable statute of limitations for claims of common law fraud or misrepresentation is MCL 600.5813; MSA 27A.5813, which provides that "[a]ll other personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statutes." If the common-law discovery rule applies a claim accrues, for limitation period purposes, when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered (1) an injury and (2) the causal connection between the injury and the defendant's breach of duty. *Lemmerman v. Fealk*, 449 Mic 56, 66; 534 NW2d 695 (1995). Plaintiffs filed their complaint in this case on January 14, 1993. Therefore, assuming without deciding that the discovery rule applies to plaintiffs' cause of action, if plaintiffs discovered or

through the exercise of reasonable diligence should have discovered that they had a cause of action against defendant for fraud sometime before January 14, 1987, the cause of action is time-barred.

This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.* 209 Mich App 365, 376-377; 532 NW2d 541 (1995). This Court must accept as true the plaintiffs well-pleaded allegations, construing them in plaintiff's favor. *Id.* After examining the pleadings, affidavits, or other documentary evidence, if there are no genuine issues of material fact, whether the plaintiff's claim is barred by the statute of limitations is a question of law for the court. *Id.* However, if a material factual dispute exists, such that further factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

After examining the record in this case, we agree with the trial court that through the exercise of reasonable diligent, should have discovered that they had a cause of action against defendant for fraud sometime before January 14, 1987, and thus the trial court did not err in dismissing plaintiffs' complaint pursuant to MCR 2.116(C)(7). The record in this case reveals that in June 1983, defendant extended an offer to purchase plaintiffs' mineral rights in Blue Lake 18A Field. As part of this offer, defendant specifically represented to plaintiffs that, as of June 1, 1983, Blue Lake 18A Field contained 45,170 barrels of remaining natural gas condensate, which was later adjusted to 51,816 barrels pursuant to the terms of the contract.

Plaintiffs contend that in late 1991, a friend of a partner of the Taylor Group advised the group that he had information that defendant had significantly understated the amount of natural gas condensate remaining in Blue Lake 18A Field. In response to this information, and at the suggestion of counsel, plaintiffs retained an expert to evaluate the volume of natural gas condensate, as well as the volume of secondary gas condensate subject to future recovery, that was remaining in the field on June 1, 1983. Gary Way, an expert engaged in petroleum engineering, estimated that the natural gas condensate remaining in the ground and subject to recovery as of June 1, 1983, was not 51,816 barrels as represented by defendant, but significantly greater.

In moving for summary disposition, defendant contended that plaintiffs' experience in the oil arid gas business should have caused them, like any reasonably prudent seller of property, to seek the advice of both counsel and experts before accepting defendant's offer to purchase plaintiffs' mineral rights. Defendant also relied heavily on a 1980 report created for plaintiff Harold Snyder regarding the value of the mineral rights in another gas field in which he owned an interest. In this report, Charles Brown, a petroleum consultant, alerted Snyder to the possibility that the use of a natural gas field for storage purposes could generate secondary natural gas condensate and that royalty owners should consider the potential for such secondary condensate recovery in negotiating the sale of mineral rights. Further, plaintiff Harold Snyder admitted in his deposition in this case that the information regarding the potential for secondary condensate in Blue Lake 18A Field was available in 1983 had he asked for it.

Plaintiffs responded to defendant's motion by arguing that in negotiating the sale of their mineral rights to defendant, plaintiffs justifiably relied on the oral representations of Donald Ross, an agent of defendant, who represented that the terms of the contract required defendant to compensate plaintiff, for all the natural gas that was remaining in Blue Lake 18A Field. Plaintiffs contended that Ross' representation regarding the terms of the contract induced them not to obtain an independent assessment of the volume of natural gas condensate remaining in the field on June 1, I983.

We agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983. Even assuming that defendant perpetuated some type of fraud upon plaintiffs, the exercise of reasonable diligence should have exposed that fraud in June 1983. If the volume of natural gas condensate remaining in the field was available to defendant in June 1983, then it must also have been available to plaintiffs. In fact, plaintiffs do not deny this, but contend that the representations of Donald Ross, referenced above, induced them not to seek an independent appraisal of the value of their own mineral rights. Although this might be true, the question is not whether plaintiffs were actually induced by Ross not to verify the accuracy of defendant's estimate of the value of plaintiffs' mineral rights, but, rather, whether their reliance on Ross' representations was reasonable under the circumstances of this case. In our opinion, the exercise of reasonable diligence should have caused plaintiffs to seek an independent appraisal of the volume of natural gas condensate remaining in their own property, notwithstanding the representations of Ross.

Accordingly, the trial court did not err in concluding that the statute of limitations barred plaintiffs' cause of action. In light of our resolution of this case, we need not reach plaintiffs' remaining issues.

Affirmed.

/s/_____
William B. Murphy

/s/ _____
Martin M. Doctoroff

/s/ _____
Janet T. Neff